85-432
No.

In The Supreme Court
OF THE
United States

Supreme Court, U.S.
FILED
SEP 14 1985
JOSEPH F. SPANIOL, JR.
CLERK

OCTOBER TERM, 1985

AIR TRANSPORT ASSOCIATION OF AMERICA
PETROLEUM MARKETERS ASSOCIATION OF AMERICA
THE JOBBERS' GROUP
INDEPENDENT GASOLINE RETAILERS
Intervenors-Petitioners,
vs.
EXXON CORPORATION,
Defendant-Respondent,
and
UNITED STATES OF AMERICA,
Plaintiff-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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QUESTIONS PRESENTED

Section 209 of the Economic Stabilization Act of 1970 ("ESA"), as amended, Pub. L. No. 92-210, 85 Stat. 743, authorizes restitution to remedy violations of federal price controls, in this instance crude oil price controls. The questions presented are:

1. Whether in actions for restitution under §209 of the ESA intervenors admitted as of right pursuant to Federal Rule of Civil Procedure 24(a) as purchasers asserting injury from having borne the impact of crude oil overcharges, yet may thereafter be denied all opportunity to present evidence of that injury forming the basis for their intervention.

2. Whether restitution of crude oil overcharges in suits under §209 of the ESA requires affording to injured purchasers some opportunity to present evidence of their injury and some opportunity to be heard on the design of an appropriate remedy, absent which opportunities procedural due process has been denied to them.

3. Whether summary judgment may properly issue pursuant to §209 of the ESA and Federal Rule of Civil Procedure 56(c) declaring impossible all restitution to injured individual purchasers without prior evidentiary inquiry into whether any individual purchasers may be identified and their injury ascertained or estimated.

4. Whether the judgment on remedy below so departs from the compensatory standards of equitable restitution as to portend significant increased litigation over substitute remedies in numerous pending but unresolved judicial and DOE proceedings.

PARTIES TO THE PROCEEDINGS

The following is a list of the parties to the proceedings below in the Temporary Emergency Court of Appeals of the United States, as required by Supreme Court Rule 21.1(b). A list of the parent companies, subsidiaries and affiliates (except wholly owned) of the corporate petitioners, as required by Supreme Court Rule 28.1, is also set forth below.

Petitioners

Petitioner, Air Transport Association of America, intervenor below, is a non-profit trade association representing the following commercial airlines:

Air California

Parent: Air Cal Investments, Inc.

Air Florida, Inc.

Parent: Air Florida System, Inc.

Alaska Airlines, Inc.

Aloha Airlines, Inc.

Subsidiaries: Aloha Facilities, Inc.

American Airlines, Inc.

Parent: AMR Corporation

Affiliates: Flagship International, Inc.
American Airlines Training Corporation
AA Development Corporation
AA Energy Corporation

Subsidiaries: American Airlines de Mexico, S.A.
Caribbean Data Services, Ltd.

Best Airlines, Inc.

Parent: Columbia Sussex Corp.

Braniff International

Parent: Braniff International Corp.

Affiliates: BIC Guardian Services, Inc.
Braniff Education Systems, Inc.
Braniff Internati nal Hotels, Inc.
Braniff Realty Company

Capitol Air, Inc.

Subsidiaries: Capitol Air Sales, Inc.
Air Reservations, Inc.

Continental Airlines, Inc.

Parent: Continental Airlines Corp.

Affiliate: Texas International Airlines, Inc.

Delta Air Lines, Inc.

Subsidiaries: Dataslink Business Systems, Inc.
Epsilon Trading, Inc.

Eastern Air Lines, Inc.

Subsidiaries: Eastern Air Lines of Puerto Rico, Inc.
Terminal Sales Co.
Dorado Beach Development, Inc.
Dorado Beach Estates, Inc.
Eastern Air Lines, S.A.
EAL Properties, Inc.

Evergreen International Airlines, Inc.

Parent: Evergreen International Aviation, Inc.

Affiliate: Evergreen Helicopters, Inc.

Subsidiary: Evergreen Tours, Inc.

Federal Express Corporation

Subsidiary: Federal Express Leasing Corp.

The Flying Tiger Line, Inc.

Parent: Tiger International, Inc.

Subsidiaries: Skyvoyager Air, Inc.
Tiger Trading Co.
Flying Tiger Air Services, Inc.
Swap, Inc.

Frontier Airlines, Inc.

Parent: Frontier Holdings, Inc.

Hawaiian Airlines, Inc.

Subsidiary: HAL, Inc.

Midway Airlines, Inc.

Muse Air Corporation

Northwest Airlines, Inc.

Subsidiaries: Montana Enterprises, Inc.
Tomisato Shoji Kabuskiki Kaisha
Affiliated Enterprises, Inc.

Ozark Air Lines, Inc.

Pan American World Airways, Inc.

Subsidiary: Pan Am World Services, Inc.

Piedmont Aviation, Inc. d/b/a Piedmont Airlines

Affiliate: Norfolk Southern Corporation

Subsidiary: Air Service, Inc.
Aviation Supply Corporation

PSA — Pacific Southwest Airlines, Inc.

Parent: PSA, Inc.

Affiliates: Airline Training Center
Pacific Southwest Airmotive
Pacific Southwest Trading Co.

Pacific Southwest Exploration Co.
PSA Leasing, Inc.
PSA Holidays, Inc.

Republic Airlines, Inc.

Subsidiary: Republic Energy, Inc.

Trans World Airlines, Inc.

Affiliates: Canteen Corp.
Century 21 Real Estate Corp.
Hilton International Co.
Spartan Food Systems, Inc.
Trans World Corp.

United Airlines, Inc.

Parent: UAL, Inc.

Affiliates: Mauna Kea Properties, Inc.
United Airlines Credit Corp.
Westin Hotel Company
GAB Business Services, Inc.
UAL Capital Corporation
146 Haynes Corporation
Olohana Corporation

Subsidiaries: Mileage Plus, Inc.
E & T Trading Corporation
United Airlines Capital Corporation
United Airlines Credit Corporation
United Airlines Third Capital Corp.
Algonquin Realty, Inc.
Dempster Properties
J & N Trading Corporation
The Linneman Corporation
United Airlines Space Technologies

USAir, Inc.

Parent: USAir Group

Western Airlines, Inc.

Wien Air Alaska, Inc.

Parent: JJF Investments, Inc.

Petitioner, Petroleum Marketers Association of America, intervenor below *sub nomine* National Oil Jobbers Council, is a non-profit trade association comprised of the following associations:

Alabama Oilmen's Association
Arizona Petroleum Marketers Association
Arkansas Oil Marketers Association, Inc.
California Independent Oil Marketers Association
Colorado Petroleum Marketers Association
Empire State Petroleum Association
Florida Petroleum Marketers Association
Fuel Merchants Association of New Jersey
Georgia Oilmen's Association
Idaho Oil Marketers Association
Illinois Petroleum Marketers Association
Independent Connecticut Petroleum Association
Independent Oilmen's Association of New England
Indiana Oil Marketers Association, Inc.
Kansas Oil Marketers Association
Kentucky Petroleum Marketers Association
Louisiana Oil Marketers Association
Michigan Petroleum Association
Mid-Atlantic Petroleum Distributors Association, Inc.
Mississippi Petroleum Marketers Association
Missouri Oil Jobbers Association
Montana Chapter, Intermountain Oil Marketers Association
Nebraska Petroleum Marketers, Inc.

New Mexico Petroleum Marketers Association
North Carolina Petroleum Marketers Association
Northwest Petroleum Association
Oil Jobbers of Wisconsin, Inc.
Oil Petroleum Marketers Association
Oklahoma Oil Marketers Association
Oregon Petroleum Marketers Association
Pennsylvania Petroleum Association, Inc.
Petroleum Marketers of Iowa
South Carolina Oil Jobbers Association
South Dakota Petroleum Marketers Association
Tennessee Oil Marketers Association
Texas Oil Marketers Association
Virginia Petroleum Jobbers Association
Washington Petroleum Marketers Association
West Virginia Petroleum Marketers Association
Western Petroleum Marketers Association
Wyoming Petroleum Marketers Association

Petitioner, the Jobbers' Group, intervenor below, is a non-profit association consisting of more than 3,000 independent marketers and jobbers of petroleum products in 49 states.

Petitioner, the Independent Gasoline Retailers, intervenor below, consists of the following:

Luther Griffin, t/a Palmer Highway Exxon, an independent Exxon brand gasoline station at 7106 George Palmer Highway, Landover, MD 20785 — not incorporated. Luther Griffin is sole owner.

Edward McGovern, t/a Maple Avenue Exxon, an independent Exxon brand gasoline station at 596 Maple Avenue, Ridgewood, NJ 07450. Incorporated — Mrs. Edward McGovern — President; Kevin McGovern — Vice President; Randy Mayl — Secy/Tres.

Anthony Monaco, t/a Milltown Exxon Servicenter, Inc., an independent Exxon brand gasoline station at North Main and John Streets, Milltown, NJ 08850. Incorporated Anthony Monaco — President; Helen Monaco — Vice President, Secy/Tres.

Donald E. Skilling, t/a Edon Service Corp. is an independent Chevron brand gasoline station at 105 Tiburon Blvd., Mill Valley, CA 94941. Incorporated — Donald Skilling — President; Mrs. Donald Skilling — Secretary.

Rex Shipley t/a Shipley's Standard Service and independent Standard brand gasoline station at 16343 Schoolcraft, Detroit, MI 48227. Not incorporated. Rex Shipley is sole owner.

Respondents:

United States of America	(Plaintiff below)
Exxon Corporation	(Defendant below)
American Independent Refiners Association	(Intervenor below)
Ashland Oil, Inc.	(Intervenor below)
Champlin Petroleum Company	(Intervenor below)
Gladieux Refinery, Inc.	(Intervenor below)
Marathon Petroleum Company	(Intervenor below)
Mobil Oil Corporation	(Intervenor below)
Murphy Oil Corporation	(Intervenor below)
National Freight, Inc.	(Intervenor below)
Pennzoil Company	(Intervenor below)
Philadelphia Electric Company	(Intervenor below)
RJG Cab, Inc.	(Intervenor below)
Geraldine H. Sweeney	(Intervenor below)
Tenneco Oil Company	(Intervenor below)
Texas City Refining, Inc.	(Intervenor below)
Tosco Corporation	(Intervenor below)
U.S. Oil and Refining Company	(Intervenor below)

State of Alabama	(Intervenor below)
State of Arkansas	(Intervenor below)
State of California	(Intervenor below)
State of Connecticut	(Intervenor below)
State of Delaware	(Intervenor below)
State of Hawaii	(Intervenor below)
State of Idaho	(Intervenor below)
State of Illinois	(Intervenor below)
State of Indiana	(Intervenor below)
State of Iowa	(Intervenor below)
State of Kansas	(Intervenor below)
State of Louisiana	(Intervenor below)
State of Maryland	(Intervenor below)
State of Michigan	(Intervenor below)
State of Mississippi	(Intervenor below)
State of Montana	(Intervenor below)
State of Nevada	(Intervenor below)
State of North Dakota	(Intervenor below)
State of Ohio	(Intervenor below)
State of Oregon	(Intervenor below)
State of Pennsylvania	(Intervenor below)
State of Rhode Island	(Intervenor below)
State of Texas	(Intervenor below)
State of Vermont	(Intervenor below)
State of West Virginia	(Intervenor below)
State of Wisconsin	(Intervenor below)
State of Wyoming	(Intervenor below)
Territory of Guam	(Intervenor below)
Territory of the U.S. Virgin Islands	(Intervenor below)

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No.

In The Supreme Court

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OCTOBER TERM, 1985

AIR TRANSPORT ASSOCIATION OF AMERICA
PETROLEUM MARKETERS ASSOCIATION OF AMERICA
THE JOBBERS' GROUP
INDEPENDENT GASOLINE RETAILERS
Intervenors-Petitioners,

vs.

EXXON CORPORATION,
Defendant-Respondent,
and
UNITED STATES OF AMERICA,
Plaintiff-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Petitioners pray that a Writ of Certiorari issue to review the remedy portions of the judgment of the Temporary Emergency Court of Appeals of the United States ("TECA") in its case nos. DC-91 through DC-100 entitled *United States of America v. Exxon Corporation.*

OPINIONS BELOW

The majority opinion of the Temporary Emergency Court of Appeals of the United States ("TECA") and the related dissenting opinion are as yet unreported and appear in Appendix A.[1] The order of TECA denying rehearing appears in Appendix B. The opinion of the United States District Court for the District of Columbia is reported at 561 F.Supp. 816 (D. D.C. 1983) and appears in Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on July 1, 1985. A timely petition for rehearing was denied on August 15, 1985. (App. B, at p. 187) This Court's jurisdiction is invoked under Section 211(g) of the Economic Stabilization Act of 1970 Pub.L. No. 91-379, 84 Stat. 796, as amended by the Economic Stabilization Act Amendments of 1971, Pub.L. No. 92-210, 85 Stat. 743, 748-50 (previously codified at 12 U.S.C. section 1904 note (1976)), which appears at Appendix F, page 305, and incorporated by reference in section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, Pub.L. No. 93-159, 87 Stat. 627, 633, which appears at Appendix F, page 315.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution is reprinted at Appendix E. The Economic Stabilization Act Amendments of 1971, Pub.L. No. 92-210, 85 Stat. 743, are reprinted at Appendix F, pages 300 through 306. The Emergency Petroleum Allocation Act of 1973, Pub.L.

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[1]Appendices A through G are separately bound and filed concurrently herewith.

No. 93-159, 87 Stat. 627, Section 5 is reprinted at Appendix F, pages 307 through 315. The Warner Amendment, Section 155a of Pub.L. No. 97-277, 96 Stat. 1830 (1982) relied upon by the District Court, is reprinted at Appendix F, pages 316 through 319.

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

The petitioner's due process claims are best understood against the background of the proceedings below. In 1978, the United States brought an action against Exxon Corporation ("Exxon") under Section 209 of the Economic Stabilization Act ("ESA") as amended, 12 U.S.C. Section 1904 note (1971). The Government alleged that Exxon had overcharged its customers by selling as higher priced "new oil" what legally should have been sold as lower priced "old oil". (App. C, at p. 264) This was the largest enforcement action ever instituted by the Government.

In 1982 both the Government and Exxon filed cross motions for summary judgment. (App. C, at p. 192) The Government's motion went beyond liability, however, and sought summary judgment as to the remedy issue as well. The Government argued that restitution pursuant to Section 209 would be accomplished by payment of Exxon's overcharges directly into the U.S. Treasury. (App. C, at p. 267) The Government offered no evidence and asserted no facts on how this proposed remedy would best accomplish the statutory goals of restitution.

At this point in the litigation, various parties moved to intervene on the ground that they were directly harmed by Exxon's pricing violations. The District Court formally stayed ruling on these motions (App. D, at p. 288) and in March of 1983, the District Court went on to decide all liability issues in favor of the Government. (App. C, at p. 191) It precisely established the amount of Exxon's

violation, (App. C, at p. 283) which with accrued interest totals $2 billion. It also approved restitution under Section 209 as the appropriate remedy. (App. C, at pp. 256, 268) At the same time, and without seeking evidence nor conducting any hearing, the District Court declared that ascertaining any of the injured purchasers and measuring injury to such purchasers is impossible. (App. C, at pp. 267, 268) Thereupon, it fashioned its own remedy, ordering that refund of the overcharges, with interest, be disbursed to state governments to be expended by them on five programs specified in the "Warner Amendment," Section 155 of Pub. L. 97-377, 96 Stat. 1830 (1982). (App. C, at pp. 272-74) That unique enactment, declared by its sponsors to be non-precedential and to be limited to expending funds not required by the Government for the compensation of identifiable injured purchasers, directed its benefits for the immediate relief of indigent consumers of heating oil during that freezing winter. The District Court disregarded the limitations expressed in the Warner Amendment by Congress and made no attempt to identify individual injured purchasers nor to assess the injury any of them bore nor to make any refunds linked to energy purchases or use. (App. C, at pp. 272-74)

After issuing its memorandum opinion, but prior to entering final judgment, the District Court granted the motions of several purchasers of crude oil and refined petroleum products, including the petitioners, to intervene; the District Court specifically found that these petitioners were entitled to intervene as a matter of right under Federal Rule of Civil Procedure 24(a). (App. D, at pp. 293-98) However, the District Court limited their intervention solely to appeal of the remedy issue and precluded them from offering evidence as to their injury

or as to the design of a compensatory remedy. Final judgment was formally entered on June 7, 1983.[2]

A divided Court of Appeals affirmed the District Court in all respects, 2-1, holding that Judge Flannery had exercised permissible discretion in ordering refunds to the states, without making any effort to identify the injured parties. (App. A, at p. 99) The Court of Appeals asserted its conclusion that refunds to purchasers are impossible (App. B, at pp. 189-90), despite the fact that it had evidence before it which definitively showed that customers of large amounts of petroleum products can be identified, their purchases can be documented, and the refunds can be computed by means of reliable economic methods and analysis. This evidence is in the form of an extensive fact-finding Report of the Office of Hearings and Appeals ("OHA") of the Department of Energy ("DOE") commissioned by another federal District Court formulating a refund remedy for crude oil overcharges. *See In Re DOE Stripper Well Exemption Litigation,* 578 F. Supp. 586 (D.Kan. 1983). This OHA report, filed by TECA in the record herein, but ignored by the Majority opinion; it is reprinted in Appendix G.

In the instant case, this Court is presented with a constitutional violation: Did not the District Court's sum-

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[2]The resolution of this petition does not require any specialized knowledge of the regulatory scheme regarding crude oil price controls. The issue before this Court involves only the meaning of restitution as initially implemented by the courts in *U.S. v. Lieb*, 333 F.Supp. 424 (W.D. Tex. 1971) and expressly included by Congress in Section 209 of the Economic Stabilization Act. *See* S. Rep. No. 92-507, 92nd Cong., 1st Sess., *reprinted* in [1971] U.S. Code Cong. & Ad. News 2283, 2291. That the DOE has amended its preferences recently in favor of payment of overcharges to the Treasury is not material to interpret this statutory term. Where an agency's interpretation does not rest on its special expertise but on principles of common law its interpretation is less potent than it would otherwise be and is *not* entitled to particular deference by the courts. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87, 63 S.Ct. 454, 459, 87 L.Ed. 626 (1943). *So. Mutual Help Ass'n., Inc. v. Califano*, 574 F.2d 518, 526 (D.C. Cir. 1977).

mary disposition of remedy infringe upon the due process rights of intervenor purchasers who were injured by the price overcharges? These purchasers were freely admitted as parties of right before the District Court but then were prohibited from offering any evidence to that Court. It is, however, not necessary for the Court to reach the constitutional question,[3] for the District Court's judgment is also contrary to settled case law authorizing intervenors to litigate the merits of questions vital to protection of their interests. Alternatively, this court may rely upon the requirements of Federal Rule of Civil Procedure 56(c) that material factual issues not be disputed and that parties establish their entitlements as a matter of law if summary judgment is to be appropriate; neither condition was met hereinbelow.

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[3]The Court's reluctance unnecessarily to decide constitutional questions was recently emphasized in *Brockett v. Spokane Arcades, Inc.*, ____ U.S. ____, 53 USLW 4793 (1985); *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105, 65 S.Ct. 152, 89 L.Ed. 101 (1944).

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH EXPLICIT CONGRESSIONAL INTENT, WITH FUNDAMENTAL PRINCIPLES OF PROCEDURAL DUE PROCESS, WITH PROCEDURES INHERENT IN THE COMPENSATORY PURPOSE OF THE REMEDY OF RESTITUTION AND WITH THE PURPOSE OF INTERVENTION UNDER FEDERAL RULE OF CIVIL PROCEDURE 24(a).

A. Restitution Compensates Those Injured By Wrongful Conduct From The Benefit Conferred Upon The Wrongdoer; An Essential Aspect Of This Principle Is The Right Of The Injured Party To Be Heard On The Nature And Amount Of His Injury And The Design Of A Remedy Therefor.

Compensatory restitution under Section 209 of the ESA, that is, repayment to individual purchasers who have been victims of price overcharges, has been specifically endorsed by Congress. When Section 209 was initially enacted in 1970, it did not mention restitution but only authorized injunctive relief in enforcement cases brought by the Government. Subsequently, in *U.S. v. Lieb,* 333 F.Supp. 424 (W.D. Tex. 1971), a District Court held that it had equitable power to award refunds to individuals injured by violations of price controls and thereupon directed refunds to overcharged tenants. Almost immediately thereafter, in the course of considering extensive additions to the ESA, Congress added a final sentence enlarging the scope of relief available under Section 209 as follows:

> "In addition to such injunctive relief, the court may also order restitution of monies received in violation of any such order or regulation." Pub.L. No. 92-210, 85 Stat. 743, Section 209.

In Senate Report No. 92-507, the foregoing amendment was explained as follows:

> "In addition to injunctive relief, the court may also order restitution of monies received in violation of any regulation or order. It was not certain that, in these circumstances, there was an inherent equitable power in the court to set things right and order restitution. Restitution has been granted in several cases successfully prosecuted by the Government in Phase I (*United States vs. Lieb,* Civil Action No. SA 71 CA 267, D.C.W.D. Tex., Oct. 13, 1971). This provision makes clear that the court has power to grant restitution."[4]

TECA has several times construed this language to underscore that its purpose was to assure compensation to individual overcharged purchasers. In *Citronelle-Mobile Gathering, Inc. vs. Edwards,* 669 F.2d 717, 722 (TECA 1982), the Court held:

> "... In the exercise of these powers to remedy civil wrongs and restore civil rights, the authority is vested to make the victims whole, 'so far as possible, and restored to a position where they would have been had it not been for' the unlawful violation, such as was practiced here."[5]

Between 1972 and 1975, TECA approved refunds to individual injured purchasers in several actions decided

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[4]S. Rep. No. 92-507, 92nd. Cong., 1st Sess., Reprinted in 2 [1971] U.S. Code Cong. & Admin. News 2283, 2291.

[5]Earlier, in *Sauder vs. Department of Energy,* 648 F.2d 1341, 1348 (TECA 1981), the Court of Appeals observed: "Equitable pricing is one of the important objectives of the Emergency Petroleum Allocation Act ... Congress has explicitly given the courts 'equitable power ... to set things right and to order restitution,' in instances of overcharging." See also *United States vs. Ringer,* 492 F.Supp. 350, 352 (D. Colo. 1980), appeal dismissed, No. 10-34 (TECA May 12, 1981) ("... restitution to the rightful owner: .. [T]he rightful owners of the overcharges are those who are overcharged.")

under Section 209. *United States of America v. Pro Football, Inc.*, 514 F.2d 1396 (TECA 1975); *DeRieux v. Five Smiths, Inc.*, 499 F.2d 1321, (TECA 1974) cert. denied, 419 U.S. 896, 95 S.Ct. 176 (TECA 1974); *University of Southern California v. Cost of Living Council*, 472 F.2d 1065 (TECA 1972), cert. denied, 410 U.S. 928, 93 S.Ct. 1364 (1973).

During and after this same period, Congress comprehensively re-examined federal petroleum price controls. *See* Federal Energy Administration Act of 1974, Pub. L. No. 93-275, 88 Stat. 96 (May 7, 1975); Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 (December 22, 1975); Energy Conservation and Production Act, Pub. L. 94-385, 90 Stat. 1142 (August 14, 1976); Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (August 4, 1977). Through its detailed review of enforcement procedures and proceedings, Congress could not help but have been aware of the consistency in TECA's above cited decisions implementing section 209. In each of these enactments, Congress made no change to the language of Section 209 and thus ratified both its 1971 amendment and TECA's continuing consistent implementation of refunds to individual overcharged purchasers.[6] Thus, Congress has spoken directly to the precise question at issue and approved of refunds to individual overcharged purchasers. As this Court observed, unanimously, in *Chevron U.S.A., Inc. vs. Natural*

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[6]When Congress has re-examined in comprehensive fashion a regulatory program, making some revisions and not others, it has been held to have ratified its prior unchanged enactments and consis nt judicial construction thereof. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 732, 95 S.Ct. 1917, 44 L.Ed. 2d 539 (1975); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed. 2d 560 (1974).

Indeed, Congress called for purchasers and consumers to participate in enforcement (and thus in restitution) proceedings and to be heard before decisions were made by the DOE on such subjects. *See* DOE Organization Act, 42 U.S.C. 7112 (15); 44 Fed.Reg. 7922 at 7923 (Feb. 7, 1979).

Resources Defense Council, Inc., ___ U.S. ___, 104 S.Ct. 2778, 2781-82, 81 L.Ed. 2d 694, 52 U.S.L.W. 4845 (1984):

> "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."

The respect appropriately to be shown to the Congressional preference for refunds to individuals, as in *Lieb, supra,* would stimulate most courts to a meaningful effort to locate and compensate overcharged customers. So District Judge Their declared in the very similar *Stripper Well Litigation:*

> "The court believes, however, that an attempt *must* be made to determine if particular harm can be shown and that Judge Flannery's resolution in *Exxon* was premature. The court believes this approach is required by TECA in light of *Citronelle-Mobile Gathering Co. v. Edwards, supra.*"[7]

Several panels of TECA are in accord that an investigation involving injured purchasers as participants is appropriate. *See Department of Energy v. Hunt,* 734 F.2d 816 (TECA 1984) and *Getty Oil Co. v. Department of Energy,* 749 F.2d 734, 739 (TECA 1984).[8]

However, the District Court below undertook no factual inquiry but declared it impossible to locate *any* of the

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[7] *In re DOE Stripper Well Exemption Litigation,* 578 F.Supp. 586, 595 (D. Kan. 1983).

[8] *See, e.g.,* 40 Fed.Reg. 40141, at 40142 (Sept. 2, 1975) ("The FEA intends, as it has in the past, to require by order whatever action is necessary on the part of offenders and downstream resellers to assure, to the extent possible, that refunds and rollbacks flow to those persons who are the victims of the overcharge"; *see also, Skelly Oil Co.,* 3 FEA ¶ 80,603 (1976).

injured customers or measure *any* part of their injury. (App. C, at p. 267). The trial judge dismissed the language of Section 209 as not limiting him to a single strict interpretation of restitution; without any effort at compensation for the injured, the District Court seized upon a substitute for restitution proposed neither by the United States nor by Exxon. (App. C, at pp. 271-72) Petitioners submit this course gave too little deference to Congressional intent.

In appropriating portions of the Warner Amendment[9] as its chosen remedial rationale, both the District Court and TECA have ignored the history and purpose of that unique enactment. Enacted in six days[10] just before Christmas 1982, the Warner Amendment was patently non-precedential in design being described by its author as "a one-time federal payment to the states,"[11] an "immediate disbursement of $200 million" to aid the indigent with their heating oil bills during "the frigid months of January and February."[12]

Congress never intended that particular distribution of funds be "restitutionary" to overcharged purchasers.

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[9]Section 155 of Pub. L. No. 97-377, 96 Stat. 1830 at 1919-1920 (Dec. 21, 1982), authored by Sen. John Warner, an amendment unrelated to the joint resolution funding various executive departments and agencies to which it was attached.

[10]*See* Statement of Senator John Warner, 128 Cong. Rec. § 15118 (daily ed., Dec. 16, 1982).

[11]*Id.* at § 15116. In the House, Cong. Dingell noted: "The provision is a one-time provision. It should not be viewed as a precedent. . . . It is a very limited provision aimed at helping people. It is, I stress, an exclusive one-time disbursement authority." 128 Cong. Rec. H10435 (daily ed., Dec. 20, 1982).

[12]*Id.* at § 15114, 15117. The Warner Amendment rested upon no nexus between the pricing violations generating its funding and the distribution of that fund to the indigent. Thus, Sen. Bennett Johnston criticized the Amendment: "To say there is a necessary correlation between the percentage of refined petroleum products consumed and overcharges . . . is just not correct . . . . [It] is an assumption supported by nothing and built out of an air castle." 128 Cong. Rec. § 15126 (daily ed., Dec. 16, 1982).

Quite to the contrary, Congress required that *no* funds be distributed thereunder which could possibly be needed to satisfy claims by overcharged purchasers harmed by violations of DOE price controls.[13] That key restriction was expressly discarded by the District Court without explanation or supporting evidence. (App. C, at p. 272)

Further, the Warner Amendment restricted expenditures by states five federal programs principal benefit to the indigent, a limitation adopted by the District Court in the instant case. *See Exxon, supra*, at 856. (App. C, at pp. 272-74) None of these programs benefit petitioners nor remedy the overcharges whose impact was borne by these petitioners.

There is nothing inconsistent between refunds to injured consumers under Section 209 and the special distribution made by the Warner Amendment, for the Amendment itself excluded funds needed for restitution to indentifiable injured purchasers and provided a substitute for restitution only under circumstances where injured customers could not be identified. By disregarding this limitation in the Warner Amendment, the District Court and TECA have managed to approve a remedy that is neither restitutionary nor harmonious with the clearly expressed Congressional intent for Section 209.

Concomitant with the power of courts to order restitution is the duty of judges to make a bona fide effort to identify who has been injured as a result of statutory infractions and to try to compensate them for their injury. Thus, in *Porter vs. Warner Holding Company,* 328 U.S. 395, 402, 66 S.Ct. 1086, 1091, 90 L.Ed. 1332 (1946),

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[13]*See* Warner Amendment Sections 155(a) and (e)(1), reprinted at App. F, at p. 316 and App. F, at p. 317. *See* 128 Cong. Rec. H 10435 (Daily Ed., Dec. 20, 1982) (Statement of Hon. John Dingell, Spokesman for the Amendment in the House and Chairman of the House Committee on Energy and Commerce).

confirming the availability of restitution to injured purchasers under World War II's Emergency Price Control Act of 1942, 50 U.S.C. § 925(a), this Court explained:

> "When the [Government] seeks restitution . . . , [it] asks the court to act in the public interest by restoring the status quo and ordering return of that which rightfully belongs to the purchaser or tenant."

Mindful of this compensatory purpose of restitution[14] and relying upon *Porter,* TECA correctly interpreted Section 209 in *Citronelle, supra,* in holding:

> "As determined by the District Court, the Government has demonstrated injury to a class of persons . . . , suffice it to note that the government has a *duty* to try to ascertain those overcharged, and refund them, with interest, from the restitution funds." 669 F.2d 717, at 723.

The Government's duty is not a futile exercise; it can be and has been accomplished in other proceedings. Such success is because these petitioners, along with other substantial purchasers of crude oil and petroleum products, are able to document their purchases.[15] Analytic

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[14] *See Moore's Federal Practice,* Vol. 5, ¶ 38.24[2], quoted with approval in *Sauder v. Department of Energy,* 648 F.2d 1341, 1348 (TECA 1981); Restatement of the Law 2d, Restitution (Tentative Draft No. 1, April 5, 1983) at 7-8 (". . . [The rules of restitution] are distinctive in that they not only withhold or withdraw a gain that constitutes unjust enrichment, but also afford relief for persons deserving compensation. The case for relief is especially compelling when the element of gain on one side is matched by loss on the other, and both result from a single wrongful act.").

[15] These petitioners purchase massive volumes of petroleum products from refiners; for example, the federally-certificated commercial airlines represented herein by petitioner Air Transport Association of America are the principal purchasers and consumer end-users of kerosene-based jet fuel ("kerojet"), which represents 6 percent of the nation's average annual output of petroleum products. Each year these airlines, fewer than 60 in number during the term of petroleum price controls, purchased 10 billion gallons of kerojet, more than 80 percent of the nation's supply. Fourteen refiners, including Exxon, manufactured 96 percent of all U.S. kerojet during price

techniques exist and have been applied to determine the impact of crude oil overcharges; those methods reliably show the portion of crude oil overcharges absorbed at given levels of market distribution for given petroleum products. These very facts appear in the instant record in the form of a detailed factfinding report by the OHA submitted to the District Court in *In re Stripper Well Exemption Litigation, supra,* and made by TECA a part of the record herein. (App. B., at pp. 189-90) OHA has determined that crude oil refiners passed on to their customers, including these petitioners, the burden of crude oil overcharges of a kind and amount nearly identical to those herein.[16] Thus, OHA determined in part:

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controls; they and the airlines maintained detailed, often computerized, records of fuel purchasees. During the term of these overcharges by Exxon, kerojet prices rose 600 percent. Airlines' total fuel expense in 1973 was $1.4 billion. By 1980 it was over $10.1 billion, having increased far more rapidly than the wellhead prices of crude oil. DOE price regulations generally required refiners to allocate their acquisition costs of crude oil volumetrically to product output in setting ceiling selling prices. This facilitates detection of the impact of overcharges upon airlines.

The very volume and concentration of airline purchases gave them, like other petitioners, sufficient economic incentives to seek to press their claims before the District Court. Part of their evidence is reflected in the OHA Report. If the District Court had elected to permit these purchaser-intervenors to present their evidence, one may anticipate that detailed analysis of the impact of Exxon's crude oil overcharges would have been accomplished. The OHA Report demonstrates the feasibility of executing a key portion of such an analysis: cost absorption and passthrough by refiners.

[16]OHA observed: "The [12,958-page] record compiled before the OHA indicates that by using marginal economic analysis, and focusing on the industry as a whole, it is possible to estimate indirectly the amount of crude oil price increases caused by the MDL 378 overcharges that were absorbed by refiners as a class, and the amount which they passed through to downstream purchasers in the form of higher product prices." The OHA's findings of injury are based upon the very type of economic analysis that is regularly employed by federal courts and agencies in complex cases. *International Brotherhood of Teamsters vs. United States,* 431 U.S. 3424, 339-40, 97 S.Ct. 1843, 1856 52 L.Ed. 2d 396 (1977); *American Textile Manufacturers Institute vs. Donovan,* 452 U.S. 490, 528-29, 101 S.Ct. 2478, 2500-01, 69 L.Ed. 2d 185 (1981); *Continental T.V., Inc. vs. GTE Sylvania, Inc.,* 433 U.S. 36, 97 S.Ct. 2549. 53 L.Ed. 2d 568 (1977).

> ". . . [T]he record also permits findings about the impact on another class which was affected by the overcharges: consumers of petroleum products who purchased directly from the refiner. This class includes *airlines*, public utilities, the federal government, and *other large purchasers* that use petroleum products in their businesses. The finding in this report that the class of refiners absorbed between 2.7 and 8.1 [percent] of the impact on them of the MDL-378 overcharges means that the class of refiners passed through between 91.9 and 97.3 percent of that impact to the class of consumers that purchased refined petroleum products directly from refiners."

Evidence of the incidence of injury to purchasers of exactly the sort described by OHA in its Report, is wholly lacking in the District Court and TECA opinions below; to obtain such evidence is the very purpose for participation in restitution proceedings by persons with competing claims to refunds of overcharges.[17] In a similar vein, this Court observed in *FPC vs. Interstate Natural Gas Company:*

> "The aim of the act was to protect the ultimate consumers of natural gas from excessive charges . . . . They were the intended beneficiaries of rate reductions ordered by the Federal Commission . . . .
>
> When a federal court of equity grants relief by way of injunction, it has a responsibility to protect all the interests whom its injunctions may affect . . . . It assumes the duty to make dispostion of the fund in

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[17]For this reason, this Court held in *Porter vs. Warner Holding Company*, 328 U.S. 395, 403, 66 S.Ct. 1086, 1091 (1946): "Should the [District] court decide to issue a restitution order and should there appear to be conflicting claims and counterclaims . . . , the court has inherent power to bring in all the interested parties and settle the controversies . . . ."

accord with equitable principles." 336 U.S. 577, 581, 582, 69 S.Ct. 775, 778 (1949).[18]

In essence, the distribution of the fund is similar to an action in interpleader and a trial court must protect all of the competing claimants by affording each an opportunity to give his evidence and be heard. *See, e.g., Maryland Casualty Co. vs. Glasell Taylor & Robinson,* 156 F.2d 519, 523-24 (5th Cir. 1946); *Pan American Fire & Casualty vs. Revere,* 188 F.Supp. 474 (D.C. La. 1960). Thus, these petitioning purchasers experienced that "distinct and palpable injury"[19] which ought customarily to elicit a judicial willingness to hear them.

This Court has previously decided that the right of access to the courts to defend financial interests is a property right protected by the Due Process clause of the Fifth Amendment. In *Logan vs. Zimmerman Brush Co.,* 455 U.S. 422, 102 S.Ct. 148, 71 L.Ed. 2d 265 (1982), this court approved Justice Jackson's declaration in *Mullane vs. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), that the Due Process Clause "at a minimum require(s) the deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." In *Logan,* this Court noted the two-part inquiry of determining whether a party has been deprived of a

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[18]The injured purchasers represented by these petitioners include many corporations and other business entities. It should no longer be open to question that due process rights in pursuit of financial property interests are protected for these "artificial persons" by the prior decisions of this Court. Whatever the outer contours of such protection, at a minimum, these entities are entitled to the same rights to notice and an opportunity for hearing before deprivation of their property by adjudication as any "natural person." *See, e.g., First National Bank of Boston vs. Bellotti,* 435 U.S. 765, 778-79, n. 14 (1978) and cases cited therein; *see also Grossjean vs. American Press Co.,* 297 U.S. 233, 244, 56 S.Ct. 444, 80 L.Ed. 660 (1936).

[19]*Warth vs. Seldin,* 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed. 2d 343 (1975).

protectable interest and then what process was due to that party. The District Court correctly determined that these petitioners, intervenors below, had a legally protectable interest, a property right, when it admitted them "as of right" to the litigation pursuant to Federal Rule of Civil Procedure 24(a).

The second *Logan* inquiry is not difficult: This Court has consistently held that *some* form of hearing is required before an individual or other litigant may be deprived of a property interest. *Matthews vs. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976); *Goldberg vs. Kelly,* 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 2d 287 (1970); *Cleveland Board of Education vs. Laudermill,* ____ U.S. ____, 105 S.Ct. 1487, 84 L.Ed. 2d 494 (1985). As this Court observed in *Eldridge, supra:*

> "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' [citations omitted]." 424 U.S. at 333, 96 S.Ct. at 902.

In the instant case, *no* hearing whatever, *no* opportunity to present evidence or argument nor to aid the District Court in designing the compensatory restitutionary remedy was ever afforded by the District Court. Without notice, the District Court decided remedy issues concurrent with liability, all upon summary judgment.

The Court of Appeals below excused the District Court based on several inapposite decisions of TECA concerning the authority of third persons to challenge consent orders and settlements entered into between the DOE and alleged violators of petroleum price regulations. *See Payne 22, Inc. vs. United States,* 762 F.2d 91 (TECA 1985); *Midwest Petroleum Company vs. DOE,* 760 F.2d 287 (TECA 1985); *Cities Service Company vs. DOE,* 715 F.2d 572 (TECA 1983). Those cases differ from the

instant case in that they involve voluntary settlements in which no violations were actually adjudged; neither was the amount of any violation found. In the instant case, Exxon has been ruled to be a violator; both the manner and precise dollar amount of its violations have been determined by the District Court and affirmed.

A second difference is that the cases cited by TECA all involved litigants who possessed a clear-cut, separate private right of action against the alleged violator under Section 210 of the ESA. That section affords to *direct* purchasers a right to single and treble damages for compensation of overcharges. Thereby having a separate right of action, whatever compensation such third parties failed to receive from Government settlements, they were free to prosecute themselves. These petitioners are *indirect* purchasers who have *no* Section 210 damage remedy available to them, yet who bore the impact of the crude oil overcharges by Exxon. The *only* meaningful time and meaningful manner in which indirect purchasers like these petitioners may be heard is in the design of a compensatory restitutionary remedy under Section 209. By prohibiting their participation in any effective manner, the District Court, and the Majority opinion in TECA have denied these petitioners due process of law, as is protested in the lengthy and forceful Dissent below. (App. A, at pp. 100-186)

B. The Decision Below Denied These Petitioner-Intervenors All Right To Litigate Their Claims Of Injury On The Merits, Thus Depriving Them Of Any Opportunity For Hearing On Matters In Which They Have A Financial Interest, In Violation Of Due Process And F.R.C.P. 24(a) And 56(c)

The District Court granted intervention as of right to these petitioners, as well as to other purchasers of petroleum products, under Rule 24 (a) of the Federal Rules of

Civil Procedure. This finding necessarily includes the determination that the interest of these petitioner-intervenors is direct and substantial and not adequately protected by the presence of other parties[20] already before the Court. F.R.C.P. 24(a).[21]

The right of an intervenor to present evidence on his own claims and so to conduct himself as to protect his interest in litigation has regularly been recognized by this Court.[22] Indeed, this Court has approved full participation by intervenors to reach the proper resolution in matters of energy regulation and has relied upon the evidence presented by intervenors to that end. *See Cascade Natural Gas Corp. vs. El Paso Natural Gas Company,* 386 U.S. 129, 87 S.Ct. 932, 17 L.Ed. 2d 560 (1967).[23]

Any contrary result would deprive intervention of all significance: It would be meaningless to afford a person the status of "intervenor as of right" and then deny him every opportunity to protect the very interest that otherwise risks infringement during litigation. *Spangler vs. Pasadena Board of Education,* 415 F.2d 1242, 1245 (9th Cir. 1969). This is especially the case where an individual

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[20]The United States claimed to be seeking restitution, in its Complaint, but requested that the entire overcharge amount be paid to the United States Treasury, with no effort being made to compensate individual injured purchasers. Exxon sought to avoid rendering compensation to any persons.

[21]The interest necessary for intervention must be a legally protectable interest. *Wade vs. Goldschmidt,* 673 F.2d 182, 185 (7th Cir. 1982); *New Orleans Public Service, Inc. vs. United Gas Pipeline Co.,* 732 F.2d 452, 464 (5th Cir. 1984). As described in the preceding section, a prohibition against litigating one's claim to a fund in restitution, after incurring injury due a wrongdoer's statutory violation or in the analogous action of interpleader, is a protectable interest.

[22]*See, e.g., French vs. Gapen,* 105 U.S. 509, 525, 26 L.Ed. 951 (1881).

[23]*Accord: Norman's on the Waterfront, Inc. vs. Wheatley,* 444 F.2d 1011 (3d Cir. 1971); *Park & Tilford Inc. v. Schulte,* 160 F.2d 984, 989, n.1 (2d Cir. 1947) *cert. denied* 322 U.S. 761, 68 S.Ct. 64, 92 L.Ed. 347 (1947); *Rector vs. United States,* 20 F.2d 845, 859 (8th Cir. 1927). Consistent with these principles is the rule that an intervenor may appeal all orders that affect him.

seeks to claim a portion of a given fund and must litigate against competing complainants seeking distributions of their own from the same monies. *See French vs. Gapen, supra; Rector vs. United States, supra.*

Early in this litigation, Exxon petitioned for interpleader of purchasers of the overpriced oil; in February 1981, the District Court responded by deferring any consideration of remedy until after resolution of liability. (App. D, at pp. 286-87) Following the filing of motions for summary judgment by Exxon and the Government, various independent refiners moved to intervene, but the District Court granted Exxon's motion for stay of their intervention "until further order of this Court." (App. D, at p. 288) When one of these petitioners, the Independent Gasoline Retailers, moved to intervene January 20, 1983, once again Exxon's motion to stay this motion was granted. (App. D, at p. 289) Barely two months later, while potential intervenors still awaited all opportunity to address remedy, the District Court issued its decision denying intervention and also declaring the amount of Exxon's overcharges and ordering that refunds of the same be distributed to state governments.[24]

Thereafter, the District Court reconsidered its denial of intervention on April 11, 1983 (App. D, at p. 290) and subsequently granted new motions of various parties, including these petitioners, pursuant to F.R.C.P. 24(a). (App. D, at pp. 291-98) However, the Court limited such intervention *solely* to appeal the remedy determination and took no evidence on remedy, formally entering judgment on June 7, 1983.[25] By affirming the District Court,

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[24]App. C, at pp. 276-85.

[25]Although there is divided authority on the power of courts to condition intervention in order to accommodate efficient prosecution of litigation, there is no authority to nullify the intervention by prohibiting intervenors from presenting any evidence or argument on issues affecting them. *See* 7A *Wright*

the Court of Appeals below has stripped intervention of any meaning, deprived these petitioners any opportunity for hearing, and thereby led to their deprivation of due process rights.

It must also be noted that the District Court decided liability and remedy questions on a motion for summary judgment. The Court of Appeals affirmed, notwithstanding the arguments of intervenors appealing the remedy and also notwithstanding the evidence of the OHA Report filed with TECA. Although the District Court declared without proof it is impossible to identify any injured purchasers or to ascertain any part of their injury, the OHA Report expertly refutes this, demonstrating at least some purchasers can be appropriately compensated for at least some of the injury they bore from unlawful overcharges.[26]

The District Court has thus rendered a decision incorrect as a matter of law under Federal Rule of Civil Procedure 56(c): The OHA Report in this record shows that material triable facts remain in dispute. Further, the prevailing party failed to present any competent facts sufficient to warrant the judgment in its favor that identifying *any* overcharged purchaser or his injury was wholly impossible. *See Poller vs. Columbia Broadcasting System,* 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed. 2d 458 (1962); *Sartor vs. Arkansas Natural Gas Corp.,* 321 U.S. 620, 64 S.Ct. 724, 88 L.Ed. 967 (1944); (App. A, at pp. 153-60). As District Judge Theis observed in *Stripper Well Litigation,* at the

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& Miller, Federal Practice and Procedure § 1922, 623 at 625 and cases cited therein.

[26]The failure of the District Court to take evidence while still issuing summary judgment underscores the wisdom expressed by this Court in *Kennedy vs. Silas Mason Co.,* 334 U.S. 249, 256-57, 68 S.Ct. 1031, 1034 (1948), cautioning that " . . . summary procedures, however salutory where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import . . ."

same juncture in that action at which District Judge Flannery made his finding of impossibility herein:

> "The court would note that it has before it no facts at this time which could establish that it is impossible to identify at least some of the injuries caused by the overcharges. For the court to conclude that impossibility exists at this time would be too hurried retreat from the objective of restitution to most nearly restore the status quo and return to those overcharged the amount of their loss." 578 F.Supp. 595 (D.Kan. 1983).

Summary judgment was also incorrect as a matter of law by reason of the application of an unduly rigorous standard of precision to assess the determination of injury suffered by individual purchasers. The Majority in the Court of Appeals approved the District Court's conclusion that it was impossible to determine the "precise injury" suffered by each claimant, notwithstanding that Exxon's violations had been determined and the exact total dollar amount of those violations clearly found. (App. A, at pp. 98-100; App. C, at p. 276) Unquestionably, the DOE's complex price regulations made it difficult to trace costs downstream from crude oil producers to indirect purchasers and ultimate consumers. However, the task before the Court was restitution; even the law of damages, with requirements more exacting than those pertaining to equitable restitution, recognizes the necessity for making approximations in cases that do not easily lend themselves to precise calculation. *See Jones & Laughlin Steel Corp. vs. Pfeifer,* 462 U.S. 523, 103 S.Ct. 2541, 2555, 76 L.Ed. 2d 768 (1983). The risk of uncertainty must be resolved under the circumstances in the best way possible, for restitution is never an exact science. *Story Parchment Co. vs. Paterson Parchment Paper Co.,* 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544 (1931); *S.O.S. Gasoline*

Enterprises vs. DOE, 4 Energy Management (CCH) 56,321 (D.D.C. 1981).[27] Since the Majority affirmed the District Court based upon the application of an inappropriate legal standard, then *a fortiori* the movant was not entitled to summary judgment as a matter of law.

2. THE DECISION BELOW CONFLICTS WITH THE COMPENSATORY PURPOSE OF RESTITUTION AND THE PRINCIPLE OF PARTICIPATION BY CLAIMANTS IN RESTITUTIONARY PROCEEDINGS ARTICULATED IN THE PRIOR DECISIONS OF THIS COURT, AND OF THE TEMPORARY EMERGENCY COURT OF APPEALS.

Several times this Court emphasized the breadth of judicial power in ordering restitution and the concomitant duty to afford to all claimants an examination of their alleged individual injury. Thus, in *Porter vs. Warner Holding Company,* 328 U.S. 395, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946), this Court affirmed the broad power of restitution of unlawfully excessive prices:

> "[A federal court] may act so as to adjust and reconcile computing claims and so as to accord full justice to all the real parties in interest; if necessary, persons not originally connected with the litigation may be brought before the Court so that the rights and the subject matter may be determined and enforced. In addition, the Court may go beyond the matters immediately underlying its equitable juris-

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[27]The task for a court considering restitution was well specified by Justice Frankfurter in his concurrence in *Federal Power Commission vs. Interstate Natural Gas Co.*: "... [To] reconstruct *as far as it possibly can be done* what would have happened had no fund accrued." 336 U.S. 577, 586, 69 S.Ct. 775, 780 (1949). The essential function for restitution is "to make the victims whole, *so far as possible,* and restored to a position where they would have been had it not been for the unlawful violations." *Citronelle-Mobile Gathering, Inc. vs. Edwards,* 559 F.2d 717, 722 (TECA 1982).

diction and decide whatever other issues and give whatever relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice. [citations omitted]" 328 U.S. at 398, 66 S.Ct. at 1089.[28]

Likewise, in *Federal Power Commission vs. Interstate Natural Gas Company,* 336 U.S. 577, 69 S.Ct. 775, 93 L.Ed. 895 (1940), this Court ordered that restitution be made to ultimate consumers and indirect purchasers, rather than being confined less equitably to the direct purchasing pipeline companies that claimed the available fund.[29]

The Court of Appeals' decision below profoundly contradicts its earlier opinion in *Citronelle-Mobile Gathering, Inc. vs. Edwards,* 669 F.2d 717, cert. denied 459 U.S. 877, 103 S.Ct. 172 (1982). In that action, under Section 209, the Court had identified the Government's duty to try to ascertain those overcharged and refund to them, with interest, the amounts due from restitutionary funds. The compensatory purpose of restitution was stressed so that victims would be restored to positions they would have occupied but for the unlawful violation. 669 F.2d at 722. The Court of Appeals specifically held that payment to

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[28] I *Pomeroy, Equity Jurisprudence* § 114 at 152-153 (5th Ed. 1941); *See also Commonwealth Trust Co. vs. Smith,* 266 U.S. 152, 45 S.Ct. 26, 69 L.Ed. 219 (1924): "The governing motive of equity in the administration of its remedial system is to grant full relief, and to adjust in one suit the rights and duties of all parties, which really grow out of or are connected with the subject matter of that suit. Its fundamental principle concerning parties is, that all persons in whose favor or against whom there might be a recovery, however partial, and also all persons who are so interested, although indirectly, in the subject matter and relief granted, that their rights and duties might be affected by the decree . . . shall be made parties to this suit."

[29] *See also United States vs. Morgan (Morgan II),* 307 U.S. 183, 193, 59 S.Ct. 795, 800, 83 L.Ed. 1211 (1939). In the Court of Appeals, the dissent correctly observes the relevance of these decisions, while a Majority makes no mention of them nor otherwise imposes any standards for a trial judge to observe in formulating a remedy under Section 209 of the ESA.

the Federal Treasury was not restitution in any meaningful sense and required the Government to undertake an effort to make refunds to individual injured purchasers. *Citronelle*, as we have noted above, fully accorded with the prior decisions of TECA,[30] ordering restitution to individual victims of price overcharges.[31]

The Majority opinion in the Court of Appeals below attempts to distinguish *Citronelle*, first claiming the effect of DOE's Entitlements Program, a regulation adopted subsequent to the violations in question in *Citronelle*, had diffused crude oil overcharges and made them indistinguishable. Although the Entitlements Program complicates analysis, the factfinding Report by OHA, which was before the Court of Appeals at the time of its decision below, demonstrates it is possible to identify injured purchasers who bore the impact of crude oil overcharges, *notwithstanding* the effects of the Entitlements Program. Although the Dissent cited the OHA Report several times, the Majority below disregarded it.

The Majority also appears to have misunderstood an element of TECA's holding in *Citronelle*. There TECA commented that restitution intends to force disgorgement by a wrongdoer of amounts by which that wrongdoer has been unjustly enriched. To that end, the plaintiff need not demonstrate he was damaged nor the amount of his damages in order to obtain judgment against the wrongdoer. *Citronelle*, *supra*, 669 F.2d at 722. The Majority below misconstrued this language to ignore utterly the compensatory purpose of restitution, elevating disgorge-

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[30]In *Citronelle*, TECA suggested several procedural devices by which restitution to individual purchasers could be achieved, including intervention and interpleader. 669 F.2d at 722. Under the precedents for intervention, as well as the case law of interpleader, those claiming an interest in the fund are individually to be heard upon their claims. *See, e.g., Maryland Casualty vs. Santer*, 344 F.Supp. 433, 437 (N.D. Miss. 1972).

[31]*See* cases cited at note , *supra*.

ment to be the exclusive purpose for restitution, a holding at odds with *Citronelle* and with this Court's decisions in *Porter*, *Interstate Natural Gas*, and *Morgan II*, cited above.

3. THE DECISION BELOW AUTHORIZES AN UNLIMITED DISCRETION TO TRIAL JUDGES FORMULATING A "RESTITUTIONARY" REMEDY AND THEREBY PORTENDS INCREASED LITIGATION.

By upholding as "restitutionary" the disbursement of $2 billion for indigent relief programs, with no evidentiary nexus between this distribution and the overcharges intended to be remedied, and indeed with no evidentiary foundation whatsoever, the Court of Appeals has climbed aboard an unruly tiger that roams well outside the historical understanding of compensatory equitable restitution. The very size of the judgment assures the instant case will have a precedential impact beyond cases involving Section 209 of the ESA.

In fact, the danger of the decision below is three-fold. First, it invites trial judges to apply their own predilections in fashioning equitable remedies where the funds before them are very large and the factfinding procedures to identify injured persons appear somewhat forbidding and complex.[32] The fact that formulating an adequate remedy in a complex matter is formidable does not excuse its undertaking. *Bigelow vs. RKO Radio Pictures,* 327 U.S. 251, 265-266, 66 S.Ct. 574, 580 (1946). Yet in resolving complex problems, the legitimacy of remedies lies in their

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[32]Resort to a philanthropic impulse in such circumstances is not unique to the District Court below; in January 1981, DOE Special Counsel Paul Bloom gave $4 million in overcharge settlements to the Salvation Army and three religious charities without authorization. "Energy Office Reports Former Counsel Gave $4 Million To Charity," *New York Times,* Section A, Page 1, Column 4 (Feb. 13, 1981). Such a distribution is not restitutionary if it prevents compensation to identifiable injured purchasers, as it does in the instant case.

adherence to settled principles, for inescapably in some of their details, remedies in complex cases must be innovative. It is all the more important, therefore, that their core rest firmly on settled law.

Second, the controlling future force of TECA's decision, if left unreviewed, should not be ignored. That Court of Appeals has exclusive jurisdiction for cases decided under the ESA. The instant case is only the first involving massive distribution of crude oil overcharges. Awaiting decision before the District Court in Kansas is the *Stripper Well Litigation,* MDL-378, in which adjudicated crude oil overcharges exceed $1 billion, including accrued interest. The DOE has advised Congress there remain at least $6 billion in further cases of crude oil and petroleum price overcharges still unresolved in dozens of administrative and judicial enforcement actions.[33] Under the instant decision, trial judges may avoid factual inquiry and assert their personal preferences for the expenditure of these billions of dollars of overcharges, without specific restitutionary direction from this Court; compensation of injured purchasers is unlikely and the risk is intensified that remedies chosen will not further statutory objectives.

The third danger of permitting the decision below to remain unreviewed is related. The District Judge below has wandered beyond restitution, and perhaps beyond the judicial province, to infringe upon budgetary judgments best left to the Congress. Under the Warner Amendment,

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[33] *See* Department of the Interior and Related Agencies Appropriations for 1986, Hearings Before a Subcommittee of the Committee on Appropriations House or Representative, Ninety-Ninth Congress (1st) Session, at pp. 248-249, testimony of Rayburn Hanzlik, the Administrator of the Economic Regulatory Administration. Mr. Hanzlik is the principal enforcement official for price controls in the DOE and is primarily responsible of overseeing litigation arising out of violation of these regulatory controls. These cases are separate from the litigation in which the OHA Report was issued, *In Re DOE Stripper Well Exemption Litigation*, MDL No. 378 (D.Kan.) in which the adjudged violation exceeds $1 billion with interest.

Congress allocated $200 million to be used on financial assistance to relieve the energy needs of the indigent, with the understanding this allotment was a one-time disbursement in the midst of freezing winter. The District Court's holding operates as a second disbursement, increasing the non-congressional expenditure on these programs by a factor of ten-fold. If more and more trial judges are given unguided discretion in framing remedies of their choice under Section 209, they risk encroachment upon the appropriate domain of the Congress, under the guise of "restitution" bearing *no nexus* to overcharges.

In the instant case, where common law principles of restitution have been misunderstood and misapplied by TECA, the intervention of this Court is assuredly warranted and would be beneficial for the future guidance of TECA and the trial courts.[34]

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[34]Its limited exclusive jurisdiction and the esoterica of energy pricing rules have insulated TECA from review. The modest caseload of TECA also explains in part why this heavily burdened Court cannot often supervise it. In the past five years, *every* year the Court has reviewed every circuit from 3 to 33 times. *See* Annual Report of the Administrative Office of the United States Courts, Table B-2, 1980-84. In the same period, this Court has reviewed only one TECA decision. *Tully vs. Mobil Oil Corp.*, 455 U.S. 245, 102 S.Ct. 1047, 71 L.Ed. 2d 120 (1982), involving a state sales tax and preemption questions.

Notwithstanding its limited jurisdiction, the cases before TECA involve the same questions of administrative law, judicial review, and procedures that confront all other Courts of Appeals. Judges in the Courts of Appeals readily cite and rely upon the opinions of their brethren in other circuits. Thus, the remaining Courts of Appeals cited opinions of the District of Columbia Circuit in 1984 in 1,189 decisions, according to LEXIS. It is noteworthy, then, that in fewer than six decisions have other Courts Appeals cited the opinions of TECA in its entire history of 13 years, except to address the boundaries between their own and TECA's special jurisdiction. This may bespeak their apprehension that the insulation of TECA has rendered it less sensitive to the common law.

CONCLUSION

For the reasons set forth, the Petition for Writ of Certiorari should be granted.

Dated: September 14, 1985

Respectfully submitted,

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85-432 (3)

No.

In The Supreme Court

OF THE

United States

OCTOBER TERM, 1985

Supreme Court, U.S.
FILED
SEP 14 1985
JOSEPH F. SPANIOL, JR.
CLERK

AIR TRANSPORT ASSOCIATION OF AMERICA
PETROLEUM MARKETERS ASSOCIATION OF AMERICA
THE JOBBERS' GROUP
INDEPENDENT GASOLINE RETAILERS
Intervenors-Petitioners,

VS.

EXXON CORPORATION,
Defendant-Respondent,

and

UNITED STATES OF AMERICA,
Plaintiff-Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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APPENDIX A

IN THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Nos. DC-91 through DC-100
(Consolidated)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
AND
STATES OF ALABAMA, ARKANSAS, CALIFORNIA, ET AL.,
Intervenor-Appellees,
VS.
EXXON CORPORATION,
Defendant-Appellant; (No. DC-93)

NATIONAL OIL JOBBERS COUNCIL AND THE JOBBERS' GROUP,
Intervenor-Appellants; (No. DC-91)

GLADIEUX REFINERY, INC., and
U. S. OIL AND REFINING COMPANY,
Intervenor-Appellants; (No. DC-92)

INDICATED REFINERS, Champlin Petroleum Company, Ashland Oil, Inc., Tenneco Oil Company, American Independent Refiners Association, Pennzoil Company, and Texas City Refining, Inc.,
Intervenor-Appellants; (No. DC-94)

GASOLINE RETAILERS, Luther Griffin, t/a Palmer Highway Exxon, Edward McGovern, t/a Maple Avenue Exxon, Anthony Monaco, t/a Milltown Exxon Servicecenter, Inc., Donald E. Skilling, t/a Edon Service Corp., Tex Shipley, t/a Shipley's Standard Service,
Intervenor-Appellants; (No. DC-95)

TOSCO CORPORATION,
Intervenor-Appellants; (No. DC-96)

PHILADELPHIA ELECTRIC COMPANY,
Intervenor-Appellant; (No. DC-97)

AIR TRANSPORT ASSOCIATION OF AMERICA
Intervenor-Appellant; (No. DC-98)

GERALDINE H. SWEENEY, RJG CAB, INC.,
NATIONAL FREIGHT, INC.,
Intervenor-Appellants; (No. DC-99)

MARATHON PETROLEUM COMPANY, MOBIL
OIL CORPORATION, and MURPHY OIL CORPORATION,
Intervenor-Appellants. (No. DC-100)

On Appeal from the United States District Court
for the District of Columbia
(Civil No. 78-1035)

(Argued: May 23, 1984 Decided: July 1, 1985)

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Before WILLIAM H. BECKER, WESLEY E. BROWN, and ROBERT E. MAXWELL, Judges.

WESLEY E. BROWN, Judge.

I.

STATEMENT OF THE CASE

These appeals arise from an action filed in the District of Columbia by the United States against the defendant-appellant, Exxon Corporation, pursuant to the provisions of Sections 208(b), 209, of the Economic Stabilization Act of 1970, 12 U.S.C.A. Section 1904 note.[1] (Hereafter, ESA)

The United States sought civil penalties and restitution from Exxon for overcharges which occurred in an unitized field known as the "Hawkins Field Unit," (HFU) located near Tyler, Texas. It was claimed that the overcharges resulted from miscalculations of "old" and "new" oil within HFU from January, 1975, until the end of price controls in January, 1981.

Upon cross motions for summary judgment, the District Court found that Exxon had violated the two-tier oil price regulations set out in 10 CFR Sections 212.73, 212.74 (1975). *United States v. Exxon Corp.*, 561 F.Supp. 816 (D. D.C. 1983).[2]

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[1]Section 208 of the Act, paragraph (a) provides for a $5,000 criminal fine for violations, while paragraph (b) provides for a civil penalty of not more than $2,500 for each violation.

Section 209 states that the Attorney General may bring an action for temporary and permanent injunction to restrain violations. In addition, the Court is authorized to:

> ". . . issue mandatory injunctions commanding any person to comply with any such order or regulation. In addition to such injunctive relief, the court may also order restitution of moneys received in violation of any such order or regulation."

[2]Prior to this appeal Exxon moved to dismiss the case for lack of subject matter jurisdiction. The District Court denied that motion. *United States v. Exxon Corp.*, 470 F.Supp. 674 (D. D.C. 1979). This Court affirmed on the basis of the District Court's opinion. *Exxon Corp. v. United States*, 616 F.2d 526 (TECA 1980).

Although Exxon did not own all of the production in HFU, the Court found that it, as Operator, had caused, and was responsible for, the violations, and that it was therefore liable, in restitution, for all of the overcharges arising from the violations, an amount exceeding $895 million during the period in question. With interest, the judgment entered in this action exceeds $1.6 billion.[3] Under the District Court's findings, the sum ultimately paid in restitution will be distributed to the separate States and Territories, in accordance with guidelines established by Congress in Section 155 of Pub. L. 97-377, 96 Stat. 1830 (1982), sometimes referred to as the "Warner Amendment."

II.

The Parties and Contentions on Appeal

Eleven separate appeals were filed in this Court, but the United States has dismissed its cross-appeal of the denial of civil penalties, and that issue is no longer in controversy at this stage of the proceedings.

In August, 1980, Exxon moved to dismiss the case for lack of indispensable interest owner parties. This motion was denied. *United States v. Exxon Corp.*, 94 F.R.D. 252 (D. D.C. 1981).

In January, 1981, the District Court, upon motion of the DOE, enjoined Exxon from litigating any legal issue presented in this case in connection with its defense in a case pending in Texas styled *Jarvis Christian College v. Exxon Corp.*, No. TY-80-43A-CA (E.D. Tex., filed November, 1980).

In *Exxon Corp. v. United States*, 655 F.2d 1112 (TECA 1981) we determined that all pricing and regulatory issues should be heard in the District of Columbia action, and all proceedings in the *Jarvis* action were stayed pending final determination in that District.

[3] The judgment required Exxon to remit to the Treasury Department the sum of $1,635,604,638.10, representing $895,501,163.85 in overcharges, and $740,103,474.25 in interest in overcharges, and $740,103,474.25 in interest, accumulated through March 31, 1983, plus $469,035.40 per day in interest, for each day of April, May, and June, 1983, to date of judgment (June 7, 1983), with interest thereafter to be computed in accordance with 28 U.S.C. Section 1961.

The principal contenders appear in Case No. DC-93, in which Exxon appeals the grant of summary judgment to the United States. The multiple issues which have been raised in this appeal will be discussed at length, but for present purposes it may be said that the questions here are directed principally to liability and the proper interpretation of the applicable regulatory framework. In particular, of course, is Exxon's objection to the finding of liability by summary judgment, without an evidentiary hearing. Exxon likewise disputes the extent of its liability, and the legality of ordering payment into the United States Treasury for distribution to the States and Territories.

Exxon also raises the question of this Court's jurisdiction, in view of the recent decision of the Supreme Court in *Immigration and Naturalization Service v. Chadha, et al.*, ____ U.S. ____, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). It is suggested that its liability, if any, will be "significantly reduced, if not eliminated altogether" by the *Chadha* ruling.

The remaining cases are appeals filed by various "Intervenor Appellants," who were permitted to intervene by the District Court, after judgment was filed, for the purpose of setting forth their various claims to a share in restitution, and their claims against the judgment. None of these appellants supports the claim of appellant Exxon on the issue of liability. They appeal only from that portion of the judgment which requires that all of the restitution funds be disbursed to the States without any attempt to first identify and compensate various purchasers of petroleum products who were the alleged victims of Exxon's violations.

The various Intervenor Appellants are:

Case No. DC-91 — National Oil Jobbers Council and the Jobbers' Group;

Case No. DC-92 — U. S. Oil & Refining Co., and Gladieux Refinery, Inc., appearing as "Old Oil Entitlements Program" participants;

Case No. DC-94 — Intervenors, referred to as "Indicated Refiners," also participants in the Entitlements Program;

Case No. DC-95 — Intervenors, referred to as "Gasoline Retailers" who claim to have been directly injured by Exxon violations;

Case No. DC-96 — Tosco Corporation, Intervenor, a participant in the Entitlements Program, and also a direct purchaser of crude oil from Exxon;

Case No. DC-97 — Philadelphia Electric Company, representing a class of purchasers, and consumers of petroleum products;

Case No. DC-98 — The Air Transport Association of America, representing the air transportation industry as a consumer of petroleum products;

Case No. DC-99 — Geraldine Sweeney, an automobile owner, RJG Cab, Inc., and National Freight, Inc., commercial transportation companies, all end users of refined petroleum products;

Case No. DC-101 — Intervenors Marathon Petroleum Company, Mobil Oil Corp., and Murphy Oil Corp., also participants in the Entitlements Program.

In addition to the Intervenor Appellants, the appeals include a group of Intervenor Appellees, these being the various States of the United States. These Intervenors support the remedy ordered by the District Court,

whereby the monies paid in by Exxon will be distributed among the States and Territories.

Other groups and organizations, appearing as Amici Curiae, present additional questions which touch upon the direct issues raised on appeal. In this respect, the owners of working interests in HFU, who have heretofore entered into "global settlements" with the Department of Energy on other occasions, contend that they may be adversely affected by a precedent established in these cases. The Navajo Nation asserts its rights as an end consumer of refined petroleum products, and complains also that as a sovereign political entity, it is entitled to share equally with the States and Territories in any distribution of the judgment in this case. The Chamber of Commerce of the United States objects to "retroactive law-making" by the district court. The American Petroleum Institute objects to distribution of the judgment to "unidentified consumers" without any effort being made to reimburse members of the petroleum industry who sustained damage from the Exxon violations. R. Lacy Inc., an interest owner in the Hawkins Field, is concerned with the question of contribution and indemnity, should Exxon's liability for all overcharges in the Unit be affirmed. The "Low Income People Together," et al., appear on behalf of some thirteen community organizations across the country which represent senior citizens, tenant organizations, etc. Such groups would be among the ultimate beneficiaries of any distribution of funds to the States pursuant to guidelines set out in Section 155 of Public Law 97-377. Total Petroleum, an Intervenor in *In re The Department of Energy Stripper Well Exemption Litigation*, M.D.L. No. 378, now pending in the District of Kansas, appears to urge that it was error to fashion a restitution remedy without consideration for the rights of direct purchasers of petroleum products. Total Petroleum claims that the remedy and

judgment in this action will have important consequences for the parties involved in the *Stripper-Well* litigation.

III.

Regulatory Framework

The controversy between Exxon and the Government[4] concerns the manner in which accountings were made in determining the identity and quantity of "new oil" removed from HFU. The overcharges which accrued here are attributable to the fact that Exxon, in making this determination, calculated upon a "lease by lease" basis, rather than upon a unit-wide comparison of field production.

The regulatory history of the Economic Stablization Act of 1970, 12 U.S.C. Section 1904, Note, (ESA) and the subsequent passage of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. Sections 751 et seq., (EPAA) has been many times reviewed by this Court, most recently in *Exxon Corp. v. United States Dept. of Energy*, 744 F.2d 98 (TECA 1984) *cert. den.* ___ U.S. ___ (December 3, 1984). It is sufficient to state that the purpose of petroleum price regulation was to ensure fair allocation of petroleum resources at equitable prices and to encourage the search for new energy resources.

Basic to the regulation of petroleum prices was a "two-tier" pricing structure, whereby monthly oil production which was less than, or equal to a corresponding 1972

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[4]For simplicity's sake, the Department of Energy (DOE), and the predecessor administrative organizations which have been charged with the duty of enforcing price regulations from time to time — the Cost of Living Council (CLC), the Federal Energy Administration (FEA), and the Federal Energy Office (FEO), are generally referred to hereafter as "the agency," and sometimes as "the government." For further explanation, see *Pennzoil Co. v. United States Dept. of Energy*, 680 F.2d 156, at 161, and Footnotes 6, 7, (TECA 1982), *cert. dismissed*, 459 U.S. 1190, (1983) (hereafter "*Pennzoil*".)

level of production from a "property" was to be sold as "old" oil at a posted price, while production in excess of the 1972 level could be sold as "new" oil, at prices substantially higher. May 15, 1973, 10 C.F.R. Sections 212.73(b), and 212.74(b). The "base production control level," or "BPCL" by which "old" and "new" oil production was to be determined was basically defined, with respect to months ending prior to February 1, 1976, as "the total number of barrels of domestic crude oil produced and sold from that property in the same month of 1972;" 10 C.F.R. Section 212.72.

Since all computations of old and new oil were to be made on the basis of production levels from a "property", it was necessary to determine the boundaries of each "property." The term "property" was broadly defined as "the right which arises from a lease or fee interest to produce domestic crude petroleum," See 10 C.F.R. Section 212.72, January, 1974. In February, 1976, the property definition was slightly restructured, without substantive change, to read "the right to produce domestic crude oil which arises from a lease or from a fee interest." Effective September 1, 1976, the definition of property was changed so that separate reservoirs subject to a single right to produce could thereafter be treated as separate properties. R. 37,606. See *Department of Energy v. Louisiana,* 690 F.2d 180 (TECA 1982), *cert. den.* 103 S.Ct. 1522; *Pennzoil Co. v. United States Dept. of Energy,* 680 F.2d 156, 162, note 9. (TECA 1982), *cert. dismissed,* 459 U.S. 1190 (1983).

Questions arose in the case of properties which were not unitized in 1972. This was the situation of Hawkins Field, which did not become formally unitized until January 1, 1975. On five separate occasions in 1974 and 1975, the General Counsel of the Federal Energy office issued interpretations to the effect that unitized multi-lease

units were single properties. These interpretations were later published in May, 1977. *See Pennzoil, supra.*

This same interpretation was issued as a general guideline for the industry in August, 1975, in the form of Ruling 1975-15. With respect to properties unitized after 1972, the Ruling provided that:

> "... the need for comparison of like quantities requires the producer in computing the BPCL to measure and total the individual 1972 monthly production levels for each of the leases that now comprise the unit. Accordingly, for example, where a unit consists of several leases that were unitized in 1973, the property consists of the unit, and the BPCL is the total 1972 monthly production from all of the several leases that now comprise the unit."

A few months later, and in December, 1975, Congress enacted the Energy Policy and Conservation Act ("EPCA"), which allowed the agency to permit price increases, without current increases in production, when the agency found that such price increases would give incentives for "enhanced recovery techniques." 15 U.S.C. Section 757(b)(2)(A); *DOE v. Louisiana, supra,* 690 F.2d at 185.

The agency then proposed a new regulation, and after considering comments, adopted 10 C.F.R. Section 212.75, which applied only to "operators of 'enhanced recovery' units formed on or after" *February 1, 1976:*

> "(a) *Rule.* A producer shall, as of the date of implementation of enhanced recovery operations on a unit or as of the date production patterns with respect to individual leases within a unit are substantially altered (whichever date occurs first) establish a unit base production control level for the unit.
>
> * * * *

> "'Unit base production control level' means the total number of barrels of old crude oil (1) produced and sold from all properties that constitute the unit, plus (2) the total number of barrels of crude oil produced from all stipper well leases that constitute the unit during the 12 month period immediately preceding the establishment of a unit base production control level for the unit, such total divided by 365, multiplied by the number of days in that particular month.
>
> "'Unit' means the right to produce crude oil that arises from a unitization agreement approved by the applicable state or municipal regulatory authority . . . ."

The term "enhanced recovery" was defined by Section 212.75 as

> ". . . any method, previously approved by applicable state or municipal regulatory authority . . . of recovering crude oil in which part of the energy employed to move the crude through the reservoir is applied from extraneous sources by the injection of liquids or gases into the reservoir."

In addition to adopting Section 212.75, discussed above, the old Section 212.72 was amended to allow operators of all other properties the option of calculating a new BPCL equal to 1975 old oil production. This had the effect of lowering the BPCL at properties where production had declined.

In the preamble to Section 212.75, the agency also announced that Ruling 1975-15 would be rescinded *ab initio* insofar as it required producers of unitized properties to treat the unit as a single property *upon unitization.* The producers were given permission to delay implementing a unit BPCL until there "has been a significant

alteration in pre-unitized producing patterns of the individual leases." The preamble further noted that:

> "If a significant alteration of producing patterns does not occur until the actual implementation of enhanced recovery operations, the unit operator may continue to determine quantities of upper tier crude oil . . . on a lease-by-lease basis. *Once enhanced recovery operations begin, the producer will be required to calculate a unitized BPCL,* as set forth in new 10 CFR 212.75 . . . and to treat the unit as a distinct property." (Emphasis supplied.)

In August, 1976, after the agency received comments on the definition of the term "significant alteration in producing patterns" as used in Section 212.75, the term was formally defined as follows:

> " 'Significant alteration of producing patterns' means the occurrence of either (1) the application of extraneous energy sources by the injection of liquids or gases into the reservoir, or (2) the increase of production allowables for any property that constitutes the unitized property." 10 C.F.R. Section 212.75(b).

In January, 1977, the agency issued Ruling 1977-2, stating that the definition of "significant alteration" contained in Section 212.75 would be considered as a "guidance in audits and compliance cases" involving pre-existing units subject to Section 212.72. At that time it was announced that those operating units subject to Section 212.72 would be permitted "to justify the establishment of the date of 'significant alteration' on 'reasonable bases' other than injection or an increase in production allowables."[5]

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[5]Paragraph IV(A)(3) of Ruling 1977-2 applied to all unitized properties required to establish a unit BPCL prior to February 1, 1976 and unitized

To summarize these regulations then, it may be stated that:

(a) the agency interpreted 10 C.F.R. Section 212.72 to require a producer to calculate a single aggregated BPCL for multi-lease units, as of the date of unitization. Ruling 1975-15 so required;

(b) In February, 1976, the agency changed this requirement, and allowed Operators of units already formed to delay implementation of a unit BPCL until the date on which producing patterns were "substantially altered;"

(c) In addition, and in February, 1976, the agency adopted 10 C.F.R. Section 212.75 which applied only to operators of enhanced recovery units formed on or after February 1, 1976. This provided prospective incentives for oil producers to enhance long-run production through future unitizations;

(d) In January, 1977, by Ruling 1977-2, the agency determined that the definition of "significant

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properties required to establish a unit BPCL prior to September 1, 1976. Determinations of the status of oil produced from units formed prior to the date on which unit BPCL regulations were adopted (February 1, 1976 for enhanced recovery units and September 1, 1976 for all units) were subject to the provisions of Ruling 1975-15, as modified on February 1, 1976. Therefore:

"... all such units formed during or after 1972 were required to calculate a BPCL by aggregating the BPCL's of all the participating properties at such time as significant changes in the units producing patterns occurred (and with respect to enhanced recovery unitized properties beginning February 1, 1976, as of the date of implementation of enhanced recovery operations)."

The Ruling then provided:

"Although a regulatory definition of 'significant alteration in producing patterns' was not provided until September 1, 1976, that definition will be considered as guidance in audits and compliance cases in determining whether a significant alteration has occurred with respect to such units. FEA will, however, on a case-by-case basis, permit unit operators to justify the establishment of the date of significant alteration in producing patterns in such units on reasonable bases other than those specified by the present definition."

alteration in producing patterns," first published in September, 1976, would be used as "guidance" in determining whether a significant alteration occurred in pre-existing units.

IV.
THE HAWKINS FIELD

The record on appeal in this case consists of over 39,000 pages in 47 volumes. Included in this record are over 500 exhibits, consisting of more than 6,000 pages, which were presented to the District Court in support of the cross motions for summary judgment. Many of these exhibits are from Exxon files — inter-office memos, copies of correspondence, reservoir studies, oil production ledgers and schedules, and computer print-outs. In addition, the District Court had records and orders of the Texas Railroad Commission, which regulated the Hawkins Field, and the parties' statements of uncontested material facts.

From this evidence, the District Court made findings of fact concerning the history of the Hawkins Field, and Exxon's application of pricing regulations to the production from that field. These findings may be summarized as follows:

A. Development of the Unit. Oil was discovered in the 10,000 acre field near Tyler, Texas in 1940. By the late 1940's, more than 200 individuals and companies produced oil on more than 300 leases in the field. In 1969 Exxon, (through its predecessor, Humble Oil and Refining Company), owned two-thirds of the field's production.

Under state law, the Texas Railroad Commission regulated the number of oil wells within the field, as well as the number of barrels of oil each well could produce. These were termed "production allowables."

The Hawkins Field was what is termed a "MER field" in Texas. In such fields the Texas Commission assigned an aggregate allowable for the entire field, which was called the maximum efficient rate of production, or "MER". This was a limit on the number of barrels which could be pumped daily from the field as a whole. The advantage of the "MER" designation was that whenever a lease operator could not produce its allowable, the Commission distributed pro rata, any unused allowable from one lease to every producing well in the field.

By mid-1960 the natural reservoir pressure in the field declined, allowing invasion of water and loss of oil into the field's original gas cap. The interest owners, led by Exxon, determined that this trend could be reversed, and the life of the field prolonged, by means of an enhanced recovery project. This would require the construction of a plant to produce inert gas, which would then be injected underground in order to increase the reservoir pressure.

Before the recovery project could proceed, it was necessary that the field be unitized in order that the costs of the gas plant could be spread among the owners, and also because the injection of gas would cause crude oil to flow underground across lease lines. As noted by the District Court, when a field becomes unitized it most likely results in the shutting in of wells within certain leaseholds, and the increase of production at others, because enhanced recovery operations cause oil to flow underground across lease lines. In such circumstances, payments to unit participants are not based upon actual production from a particular well, but upon an imputed percentage of the unit's total production. *United States v. Exxon Corp., supra,* 561 F.Supp., f.n. 6, p. 820.

In 1969 Exxon actively began to promote unitization, meetings were had with 300 other working interest owners in the field, and negotiations went on with more than

2,200 royalty interest owners. At this time, Exxon secured permission from the Commission for an interim conservation project, whereby up to 20 million cubic feet of natural gas per day could be injected into the field for the purpose of increasing production. In November, 1974, and in anticipation of unitization, the Commission increased the Hawkins Field MER from 87,000 barrels per day to 112,000 barrels per day.

In late 1974 the Unit Agreement was finally executed and approved by the state Commission. Under its terms, Exxon was named Unit Operator, costs of the proposed gas plant were to be shared, and production was divided according to a formula based upon estimates of the recoverable reserves under each tract.

At the time the Unit Agreement was approved the state Commission provided Exxon with a "unit production allowable," to be effective on January 1, 1975. Under prior Commission orders, the production allowable of an individual shut-in well could be transferred only pro rata among all other wells at the Hawkins Field. The new "unit allowable", which was equal to the then existing MER of approximately 112,000 barrels per day, allowed Exxon to transfer production among wells within the unit, *at will.*

The natural gas injections which were initially permitted by the state Commission in 1969, continued beyond the effective date of unitization, and through the years, until the inert gas plant was completed and put into operation in March, 1977.

B. Exxon's Pricing Policies. The trial court found: that when oil price control regulations were initiated in 1973, Exxon already operated several multi-lease units, some of which, like Hawkins Field, were formed after 1972, the base year designated for calculation of the

BPCL; that Exxon applied an aggregated, unit, BPCL at other units it operated in Texas, California, Alabama and Florida; that Exxon departed from this practice at Hawkins Field following a determination it made in 1974 that an 80% reduction in the amount of new, released and stripper oil which could be claimed would follow if calculations were made upon a unit basis.

Exxon contends that the trail court's finding that "Exxon departed from its prior practice" at Hawkins Field was erroneous and based upon a "one-sided view of disputed evidence," inasmuch as "Exxon's prior practice was to review its general guidelines, the many oral and written modifications thereto, and then to examine each situation carefully and independently — which was the same practice employed at the HFU."

Exxon's argument is without merit. Exxon's own records establish that in the fall of 1973, following initial price regulation, Exxon issued instructions to treat several multi-lease units which it operated as single properties, with a single, unit BPCL. These instructions included units formed after 1972, the base year designated in the regulations for the calculation of the BPCL. In accordance with this practice, Exxon applied an aggregated, unit BPCL at units it operated in Texas, California, Alabama and Florida. These units included the Friendswood Unit, unitized on September 1, 1973. As an interest owner, and as a purchaser of crude oil, Exxon received notification from many other companies that units were to be treated as single properties, each with a single, aggregated BPCL. Nevertheless, when Hawkins Field was formerly unitized on January 1, 1975, Exxon thereafter did in fact apply individual lease-by-lease BPCL calculations.

When Ruling 1975-15 was issued in August, 1975, making explicit the regulations' requirements that a unit

BPCL be calculated and applied to every unit, as of the date of unitization, Exxon, along with other industry critics requested modification or clarification of the Ruling. When the February, 1976 amendments to the oil price regulations were under consideration, Exxon suggested that the provision for lease-by-lease calculation of exempt oil should be extended for two years after formation of the unit, or until injection began in an enhanced recovery project. Exxon also urged that the same rules be applied to units formed *before* February 1, 1976. As noted, however, the February, 1976 amendments adopted by the agency applied only some of the new incentives to pre-existing units, and provided that the new Section 212.75 would only apply prospectively.

Following a meeting in mid-February, 1976, with agency representatives, Exxon decided that until the meaning of the new regulations was "clarified," it would be proper to continue its lease-by-lease calculations at the Hawkins Field, and it so advised the other interest owners.

The agency solicited comments in April, 1976, as to how best to determine when there was "a significant alteration" in producing patterns. Exxon suggested that the term be defined as "the initiation of the major injection or other programs contemplated by the unit, provided however that the date will be no longer than two years from the formation of the unit." The agency in August, 1976, published the definition of "significant alteration in producing patterns" as being either the injection of liquids or gases into the reservoir or the increase of production allowables for any property constituting the unit. Exxon then determined that the regulations did require the calculation of an aggregated, unit BPCL for the Hawkins Field Unit, but it did so only as of September 1, 1976, and then under the more generous provisions of Section

212.75. Exxon continued this manner of calculation until the repeal of the oil price regulations in January, 1981.

In reviewing the production data from the Hawkins Field, the Trial Court concisely illustrated the effect of Exxon's pricing policies which we described above:

> "From January 1975 through August 1976 production at the Hawkins Field remained relatively stable at about 112,000 barrels per day.... Thereafter, despite the implementation of the inert gas enhanced recovery project in March 1977, production began to decline, to about 90,000 barrels per day in July 1977, and finally dropping to about 45,000 barrels per day in January 1981 at the time oil prices were decontrolled... Despite the steady decline in production, an increasing percentage of oil was accounted for by Exxon as upper-tier, higher-priced oil, until beginning June 1, 1979 *almost all* of the then 62,000 barrels per day was classified as new oil." 561 F.Supp. at 825. (Emphasis supplied.)

V.

Conclusions Of The Trial Court

In sustaining the Government's motion for summary judgment the trial court made a series of determinations applicable to our consideration of these appeals.

1. Section 212.72, the unit property regulation, was procedurally valid. 561 F.Supp. at 826-829. That issue has not been raised on appeal.

2. Under *Pennzoil, supra,* a unitized field must be considered a single property for purposes of computing a unit BPCL.

3. The rescission of Ruling 1975-15, which had required that a BPCL be established upon unitization, was

not a mere "relaxation in enforcement policy," as claimed by the government. The agency's Ruling in February, 1976 "amounted to a completely new, although less strict, interpretation of the property definition found in Section 212.72." 561 F.Supp. at 835.

4. The agency's determination in 1976 to allow unit operators subject to 10 C.F.R. Section 212.72 to postpone adoption of a unit BPCL until the occurrence of a "significant alteration in producing patterns," was reasonable. The definition of this term, as being either "the application of extraneous energy sources by the injection of liquids or gases into the reservior," or, "the increase of production allowables for any property that constitutes the unitized property," was consistent with the intent of Congress that the adminstration of price controls be workable and effective.

5. A "significant alteration in producing patterns" occurred at Hawkins Field on January 1, 1975, the date of unitization, because Exxon then transferred production allowables among contingent leases, thus significantly altering producing patterns within the field. In addition, Exxon was also injecting gas on that date. 561 F.Supp. at 843. Under these circumstances, Exxon's obligation to calculate a unit BPCL then accrued.

6. Exxon failed to establish a reasonable alternative basis to justify a finding of significant alteration in producing patterns in the field on a date other than January 1, 1975. A date based upon evidence of the field's "underground drive mechanism" would not be a reasonable alternative basis because it would not be a workable system for enforcing the pricing program.

7. Exxon's estoppel defense is without merit because the undisputed facts in the case establish that its reliance, if any, on unauthorized, informal statements of agency

employees, was not reasonable. Furthermore, even if there was reasonable reliance, the government pursued "important national policy objectives" in its pricing regulations, and these objectives should not be frustrated by allowing Exxon "unjustly to reap huge profits from its dubious exploration of the limits of regulatory tolerance." 561 F.Supp. at 848.

8. Since Exxon caused all of the overcharges in the filed by its pricing, injection and production decisions, it is liable for full restitution of all the overcharges, with interest.

9. Civil penalties would not be imposed because Exxon did not attempt to conceal its pricing practices.

10. Since it would be "impossible" to identify the ultimate victims of Exxon's overcharges, due to the "prevasive system of price controls" in the petroleum industry, the Trial Court adopted a remedy used by Congress in a similar situation, and ordered Exxon to remit all overcharges to an escrow account in the United States Treasury to be held in trust by the Treasury, for future disbursement to the States for the ultimate purpose of funding specific energy conservation programs, in accordance with procedures set out in Section 155 of Pub. L. No. 97-377, 96 Stat. 1830, 1919 (1982). In so doing, the trial court also stated: (561 F.Supp. at 856).

> "In formulating its order, the court in no way relies on Section 155 as an express statutory grant of authority to this court, but acts instead in the exercise of its broad equitable powers to order restitution."

VI.

Issues On Appeal

Exxon's contentions in this appeal may be summarized in the following manner:

A. The District Court violated established summary judgment principles in granting judgment to the Government because it improperly resolved factual disputes, ignored relevant evidence, viewed all evidentiary inferences in favor of the DOE, and improperly assumed to be true facts outside the record.

B. The District Court erred in summarily determining Exxon's liability because:

1. The history of the unit property rule establishes that Hawkins Field Unit was not subject to the definition of "significant alteration in producing patterns" set out in 10 CFR Section 212.75;

2. The restrictive definition of "significant alteration in producing patterns" can not be given retroactive effect;

3. Retroactive application of only selected portions of 10 CFR Section 212.75 is arbitrary and capricious;

4. When a "significant alteration in producing patterns" occurred at the Hawkins Field Unit was an issue for resolution at trial;

5. Ruling 1977-2 expressly provides that Exxon be afforded an opportunity to establish a reasonable alternative "significant alteration" date for the HFU.

C. The District Court erred in summarily determining questions of remedy in favor of the DOE because:

1. Monetary awards to uninjured state governments are not restitution;

2. Monetary awards to uninjured state governments improperly expose Exxon to multiple liability;

3. The District Court assessed liability on the basis of unpleaded and unproved refiner allocation violations;

4. The amount of the judgment is grossly overstated;

5. Exxon's liability must be reduced, if not eliminated, in view of the unconstitutional one-house veto provisions in the EPAA and the EPCA.

D. The District Court erred in requiring Exxon to pay on behalf of other interest owners alleged overcharges received by them, because the evidence did not establish that Exxon can be reimbursed for such payments;

E. The District Court erred, as a court of equity, in requiring restitution of the full amount of the alleged overcharges and prejudgment interest because:

1. Restitution is an equitable remedy that implicates questions of fairness;

2. A balancing of equities requires an evidentiary hearing;

3. Restitution of the full amount of the alleged overcharges is inequitable;

4. Awarding prejudgment interest is inequitable.

The Government's contentions in this appeal may be summarized in this manner:

A. The District Court correctly held that a single BPCL had to be adopted at the Hawkins Field in January

1975 when it was unitized and a significant alteration in producing patterns occurred, because:

1. This Court has previously determined that Section 212.72 required establishment of a single BPCL upon unitization;

2. The District Court properly applied the less stringent Ruling 1977-2, permitting a unit operator to delay establishment of a single BPCL until occurrence of a significant alteration;

3. The District Court properly granted summary judgment upon the basis of Exxon's own undisputed data, because:

a. Under the definition of significant alteration used as guidance, a significant alteration occurred on January 1, 1975; and

b. The District Court correctly held that Exxon failed to justify the date of the significant alteration on any other reasonable basis.

B. The District Court properly concluded that Exxon, the Operator who caused the overcharges, is liable for all overcharges with interest, because

1. Exxon is liable for all overcharges at the Unit under *Sauder v. DOE*, 648 F.2d 1341 (TECA 1981);

2. Exxon is entitled to no reduction as a result of consent orders between DOE and other companies; and

3. The District Court did not abuse its discretion by awarding interest on the overcharges at the rates provided.

C. The District Court properly concluded that payment of Exxon's overcharges to the states is a lawful and

appropriate remedy to effectuate restitution in this case, because

1. The District Court correctly concluded that the overcharges were so widely distributed through the operation of price controls that individual harm could not be calculated with reasonable certainty; and

2. The District Court reasonably exercised its broad discretion to fashion a remedy — payment to the states — which achieves the central purpose of restitution under the EPAA.

VII.

The *Chadha* Issue

Before proceeding to the question of the nature and extent of Exxon's liability in this case, we first address questions which have been presented by the recent decision of the Supreme Court in *Immigration and Naturalization Service v. Chadha, supra,* ____ U.S. ____, 77 L.Ed.2d 317 (1983).

Judgment was entered in this action on June 7, 1983. The day before Exxon filed its notice of appeal with this Court, it moved for "reconsideration" of the trial court's decision on the ground that, in view of *Chadha,* the entire EPAA should be retroactively declared void because of an allegedly unconstitutional provision in Section 4(g)(2) of the Act which allowed either House of Congress to veto executive actions.

The District Court denied the motion (a) because it was tardy since it involved an issue which was available, but not raised, prior to judgment; (b) because notice of appeal had been filed and the trial court was divested of

jurisdiction; and (c) because Exxon lacked standing to challenge the statutory provisions because it could prove no injury due to the existence of the veto provision. It was also pointed out that the District Court was without power to determine such constitutional issues, jurisdiction being vested instead with the Temporary Emergency Court of Appeals.[6]

On appeal, Exxon claims that the *Chadha* issue remains viable, that it has standing to complain because its injury is obvious, that the veto provisions in question are not severable, and therefore the Act, and all regulations issued pursuant to the Act are void, *in toto*. In addition, it is claimed that the subject matter jurisdiction of both the trial court and this appellate court is placed in question by the *Chadha* precedent.

It is the position of the Government that the *Chadha* issue is not before the Court because, under appellate rules, the question was not timely raised.

The history of the veto provisions which appear within the Economic Stabilization Act of 1970, as well as Section 551, Section 552 of the Energy Policy and Conservation Act, P.L. 94-163, (EPCA), 42 U.S.C. 6201, Note, and the effect of those provisions in terms of the *Chadha* decision, have recently been examined at length by this Court in *Exxon Corp. v. United States Dept. of Energy, supra*, 744 F.2d 98 (TECA 1984), *cert. den.*, 105 S.Ct. 576, a which involved certification of constitutional questions raised by *Chadha*.

Similar questions have not, of course, been certified under Section 211(c) in these appeals, but because some

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[6]Section 211(c) of the Economic Stabilization Act of 1970, 12 U.S.C.A. Section 1904, note, provides that when a District Court determines that a substantial constitutional issue exists, it shall certify that question to the Temporary Emergency Court of Appeals.

question has been raised by Exxon concerning this Court's jurisdiction, this panel of the Court will briefly address Exxon's arguments.

In April, another panel of this Court determined that the Gulf Oil Corporation had standing to challenge the subject matter jurisdiction of this Court by contending that the statutes granting jurisdiction contained unconstitutional legislative veto provisions. *Gulf Oil Corp. v. Dyke,* 734 F.2d 797 (TECA 1984), *cert. den.* 105 S.Ct.173. In *Exxon,* we adopted that holding and in addition ruled that the *Chadha* decision would not be applied retroactively to invalidate all or any part of the EPAA, the EPCA, or the Regulations fashioned to implement those Acts. We further held that even if the rule of *Chadha* should be found to be retroactive, the veto provisions were severable, as found in *Gulf Oil Corporation, supra.* We further ruled that the Regulations were not unlawfully tainted by the presence of the one-House veto, or rendered invalid because the veto power had been exercised on two occasions in July, 1975.

We need not repeat what was said in *Exxon, supra,* with respect to the *Chadha* issue. This Court has determined that *Chadha* may not be used by the oil industry to escape the responsibilities owed to the nation and its people as represented by the law and regulations implemented by the DOE and interpreted by this Court.

We find that we have jurisdiction and that *Chadha* has no effect on any of the issues presented in these appeals.

VIII.
The Liability Issue

Exxon contends that the District Court violated well established summary judgment principles in granting judgment to the Government, in that the trial court

improperly resolved factual disputes, ignored relevant evidence, improperly resolved all evidentiary inferences in favor of the Government and improperly assumed to be true facts outside the record.[7]

A. The Pennzoil Decision. Our discussion of the trial court's findings and Exxon's contentions regarding liability must begin with a consideration of this Court's decision in *Pennzoil Co. v. United States Dept. of Energy, supra,* 680 F.2d 156.[8]

The *Pennzoil* litigation was initiated by the company upon a claim that Ruling 1975-15 was invalidly promulgated, as an announcement of a new rule not previously inherent in, or justified by, prior regulations. In affirming summary judgment in favor of the government upon this claim, we determined that Ruling 1975-15 was a correct interpretation of 10 C.F.R. Section 212.72, requiring the establishment of an aggregated BPCL upon formation of a unit:

> "Ruling 1975-15 is an interpretative ruling, not a legislative change, *and simply made explicit what was implicit in the property definition from the beginning.*" (680 F.2d at 176)

This Court further held that Ruling 1975-15 was not unlawful "retroactive" legislation, for it did not represent a departure from well established practice, let alone an "abrupt departure" (Note 35, p. 176, 680 F.2d). We found that there was no basis for applying estoppel against the Government because of alleged confusing, misleading and contradictory information or Rulings supplied by agency officials. We refused to do so "on the facts here presented

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[7]Fed. R. Civ. P. 56(c) provides that summary judgment can be granted only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."

[8]Exxon appeared as amicus curiae in *Pennzoil.*

in favor of sophisticated oil field operators exploring the possibility of dubious regulatory leeway without even requesting an official interpretation." (680 F.2d at 177).

The *Pennzoil* case was remanded to the District Court for trial of the Government counterclaim for enforcement of Ruling 1975-15. The case was settled upon Pennzoil's agreement to pay $14.75 million to the United States Treasury. See *Cities Service Co. v. Department of Energy*, 715 F.2d 572 (TECA 1983), *affirming Pennzoil Co. v. DOE*, 4 Energy Mgmt. (CCH) Paragraph 26,415 (D. Del. 1983).

B. Unit Property Rule. Exxon first claims that the regulatory history of the "unit property rule" establishes that HFU is not subject to the definition of "significant alteration in producing patterns" set out in 10 C.F.R. Section 212.75. In this respect, Exxon argues that the history of the regulation reveals prolonged agency indecision, the subsequent partial rescission of Ruling 1975-15, and the failure to explain or define the term "significant alteration in production patterns" until September 1, 1976 when the term was finally defined as part of an amendment to 10 C.F.R. Section 212.75. Exxon claims that since the Section 212.75 definition does not apply to units formed before September 1, 1976, the term "significant alteration in producing patterns" is only a general concept, when applied to those units, subject to an evidentiary determination upon a case-by-case basis.

According to Exxon, "(t)his result, of course, poses no conflict with this Court's decision in *Pennzoil* . . . (because) *Pennzoil* upheld Ruling 1975-15 but also expressly declined to consider the legal effect of the Ruling's . . . partial recissi[illegible] *initio*. . . . What we are concerned with here, however, and what was *not* decided in *Pennzoil*, is *when* must a multiple lease unit convert from lease-by-

lease accounting to unit-wide accounting." (Brief for Exxon, n. 283, p. 56).

In its insistence that the *Pennzoil* decision resolved only the question of whether HFU constituted a single "property", and not the question of "when" the Unit BPCL was to be calculated for that property, Exxon continues to present arguments which were decided adversely to its position in that decision.

The issue posed by, and resolved in, *Pennzoil* was whether an "aggregation of (Pennzoil's 1972 lease) BPCL's (was required) *upon formation of a post-1972 multiple-property, enhanced recovery unit.*" 680 F.2d at 159 (emphasis supplied).

In *Pennzoil*, we recognized the fact that in February, 1976 the agency rescinded Ruling 1975-15, insofar as it required producers to treat the unit as a single property, before such time as there was "a significant alteration in pre-unitized producing patterns of the individual leases. . . ." Finding that this rescission did not "throw into question the validity" of Ruling 1975-15, as to previous production from unitized leases, we stated (f.n. 13, 680 F.2d at 164):

> "There is not now before us any issue concerning the application of this subsequent rule-making and we refrain from expressing any opinion concerning it *other than that it does not militate against our disposition of the issues presented to us on this appeal.*" (Emphasis supplied).

Under our decisions in *Pennzoil, supra*, and its predecessor, *Grigsby v. Department of Energy*, 585 F.2d 1069 (TECA 1978), *cert. den.* 460 U.S. 1086, it is clear that Section 212.72 *unembellished by any agency interpretations*, required the adoption of a single BPCL, *upon unitization. See also Francis Oil and Gas, Inc. v. Exxon*

Corp., 687 F.2d 484, at 488 (TECA 1982), *cert. denied*, 459 U.S. 1010 (1982).

Under these circumstances, we find that Exxon's claim that *Pennzoil* does not control the question of "when" a unit must convert to unit wide accounting is without merit. Apart from Ruling 1975-15, Section 212.72 required the establishment of a single BPCL upon unitization of the Hawkins Field.

C. Partial Rescission of Ruling 1975-15: The "Significant Alteration Test."

As previously noted, in January, 1976, the agency, in response to the newly enacted EPCA, began proceedings leading to adoption of the new regulation, 10 C.F.R. Section 212.75, designed to provide new production incentives, prospectively. At the same time, and in February, 1976, the agency determined that a "limited part" of Ruling 1975-15, insofar as it required a producer to compute a single unit BPCL upon unitization, should be rescinded *ab initio*. The balance of Ruling 1975-15 was "affirmed in all other respects," see *Pennzoil*, 680 F.2d at 164, n. 13. It should also be remembered that the agency continued to point out that once a significant alteration in producing patterns had occurred at a unit, lease by lease accounting procedures would no longer be justified.

Ruling 1975-15 was rescinded only "insofar as it requires producers of unitized properties to total all the BPCL's of the participating leases and to treat the unit as a single property, *before such time as there has been a significant alteration in pre-unitized producing patterns of the individual leases.*" *Id.* (Emphasis supplied). Throughout the administrative proceedings leading to eventual adoption of a precise definition of "significant alteration in producing patterns" in August, 1976, it is clear that attention was centered upon the fact that lease-by-lease

accounting was not permissible after some alteration in production methods precluded any "meaningful comparison" of current and base period production, since "the bulk of the actual production thereafter may be concentrated from only a few producing wells on fewer than all of the several leases. . . ." 41 Fed. Reg. at 4937. The agency noted that a significant alteration normally occurs when "enhanced recovery operations are begun, or . . . production from certain leases is reduced or discontinued in preparation for enhanced recovery operations." *Id.* "Enhanced recovery techniques," include the "inject(ion) (of) fluids or gases (which) may have originated in the reservoir . . . as long as they are injected by an extraneous energy source." 41 Fed. Reg. at 4938. In soliciting comments on a method of determining the point at which a significant alteration occurs, in April, 1976, the agency pointed out that:

> "It is . . . clear that due to the eventual *alteration* of lease-by-lease producing patterns, production from the unit must at some point be treated as the aggregate of production from all the participating leases, in order to obtain a meaningful comparison of production levels." 41 Fed. Reg. at 16181, (Emphasis supplied).

The formal definition of "significant alteration", which was finally selected by the agency in August, 1976, was, as previously noted, "the increase of production allowables for *any* property that constitutes the unitized property," or "the application of extraneous energy sources by the injection of liquids or gases into the reservoir." 10 C.F.R. Section 212.75(b). (Emphasis supplied.)

In the District Court, the Government contended that the partial recission of Ruling 1975-15 was only "a relaxation of enforcement policy," with the "significant alteration" test serving only as a guidance in compliance audits

Exxon claimed that the "significant alteration" test constituted an entirely new regulation, which would not be applicable to the Hawkins Field Unit until September 1, 1976, the effective date of the formal definition of the term.

In ruling on the issue, the District Court ultimately determined that the significant alteration test "amounted to a completely new, although less strict, interpretation of the property definition in Section 212.72." *United States v. Exxon Corp., supra,* 561 F.Supp. at 835.

The District Court particularly noted, and was puzzled by, Exxon's insistence that the new test could not be "retroactively" applied before September 1, 1976: (561 F.Supp., f.n. 39, p. 843).

> "Exxon's barrage of attacks on the agency's amendments to the regulations in February and September 1976 — decrying their retroactive application, their discriminatory effect, and the rigor of their standards — is puzzling. If the court were to uphold Exxon's challenges, at most the court could invalidate all or part of Section 212.75 and the significant alterations test as applied to pre-existing units. *But that would not leave a vacuum.* Instead, there would remain to apply to the Hawkins Field Unit only Section 212.72, unembellished by either Ruling 1975-15 (rescinded *ab initio*) or by the significant alterations test. But the TECA has held in the *Pennzoil* case that implicit in the property regulation itself is the unit property rule, the requirement that a unit BPCL be calculated as of the date of unitization. . . . *Consequently, if Exxon's attacks were to succeed, it would still find itself in the position it is trying to escape. Exxon apparently seeks the best of all possible worlds. It would like the court to uphold the recission of Ruling 1975-15 and to rewrite the rule which re-*

placed it to suit Exxon's practices at the Hawkin Field, in effect leaving it free of any rule at all. Th 1976 amendments to the oil price regulations canno reasonably be read that way." (Emphasis supplied).

In an attempt to avoid the inconsistency in its argu ment which was noted by the trial court, Exxon ha shifted ground in this appeal, and now relies upon what i perceives to be a *"generalized significant alteration test* dependent upon a case by case evidentiary analysis.

In contending that the trial court erroneously dete mined the issue by summary judgment, Exxon first claim that this Court is somehow bound by its 1981 comment i *Exxon Corp. v. United States, supra,* found at f.n. 3, 65 F.2d at 1114, to the effect that the question of when significant alteration occurred in producing patterns a Hawkins Field was "the key factual question to be lit gated at trial." This statement, of course, was *obite dictum,* made without reference to the circumstance surrounding the partial rescission of Ruling 1975-15 the enactment of 10 C.F.R. Section 212.75, and certain without benefit of the record put before the trial court 1983. Furthermore, we clearly noted that the four issue mentioned in this footnote were not before the Court the 1981 appeal.[9]

In claiming that the trial court erroneously "rewrote the generalized concept of determining whether or n

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[9]In the 1981 appeal we noted that there were four basic issues to determined: 1) whether or not the Hawkins Field Unit is a single prope or separate leases under 10 CFR Section 212.72 of the regulations; assuming that the Hawkins Field Unit is a single property, then when di significant alteration in producing patterns occur, thus establishing a u base control level for pricing purposes under 10 CFR Section 212.72; whether Exxon can be held liable for all overcharges in the field; and whether the overcharges should be paid to the United States Treasury. passing we stated that the question of when a significant alteration occurr was "the key factual question to be litigated at trial," and that the ot issues presented disputed legal questions.

there had been a significant alteration in the Hawkins Field, by its action in adding the "exceptionally restrictive" definition which was not adopted until September 1, 1976, Exxon presents several arguments against "retroactive" application of these tests.

In the first instance, Exxon recites much of the same type of "regulatory history" raised in the *Pennzoil* case with reference to claimed "agency indecision" and inconsistent positions which may have been taken by various agency officials from time to time. While Exxon has not specifically pressed its claim of "estoppel" on this appeal, it appears to rely upon some evidence which it claims indicates that the agency "officially determined" that lease by lease accounting at Hawkins after January 1, 1975, was not in violation of the regulations.[10] In this respect, an "Audit Review Report," dated May 27, 1976, indicates that since the agency had rescinded "that part of Ruling 1975-15 which specifically stated that units were to be treated as one property," a "potential violation amount has not been calculated and Hawkins Field has been eliminated from our report as a potential violation." However, once the audit of Exxon had been completed, a Notice of Probable Violation was issued on January 10, 1978, focused upon "Exxon's activities as operator of the Hawkins Field Unit . . . during the period September 1, 1973, through December 31, 1976. . . ."

The preliminary report of field auditors can not be raised as an official, binding and final agency position

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[10]In the trial court Exxon claimed that the decision to unitize Hawkins Field, and the decision to maintain lease by lease accounting, were made in reasonable reliance "on repeated agency assurances to Exxon and others that such practices were allowable under the regulations."

The trial court found that the estoppel defense failed because "the undisputed facts in this case demonstrate that Exxon's reliance, if any, on unauthorized informal statements by agency employees, was not reasonable." 561 F.Supp. at 845.

upon the question of what constitutes a "significant alte ation in producing patterns," or a determination of whe such alteration occurred at Hawkins Field. See *Johnso Oil Co., Inc. v. U.S. Dept. of Energy,* 690 F.2d 191, 20 (TECA 1982), holding that a proposed remedial orde following audit was not an official agency position, an *United States v. Fitch Oil Co.,* 676 F.2d 673, 677 (TEC 1982), ruling that audit policies intended to govern inte nal agency procedures are not binding on the Departmer of Energy.

D. Ruling 1977-2: Application of Section 212.75 Hawkins Field.

As noted, in January, 1977, the agency determined Ruling 1977-2 that the definition of "insignificant alter tion" found in Section 212.75 would be used as "gui ance" in audits and compliance cases involving uni which were formed before February, 1976, which we otherwise subject to the provisions of Section 212.72.

After reviewing the Record, and the administrati history of the ruling, we determine that the District Cou properly applied Ruling 1977-2 in allowing Exxon, as Un Operator, to delay establishing a single BPCL until significant alteration occurred at Hawkins Field.[11] W further find that the trial court properly determined th question according to the definition of significant alter tion found in Section 212.75.[12]

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[11] "A unit base production control level must in general be established as the effective date of unitization, and the producer must treat the unit as single property. Section 212.75 provides an exception to this requireme where . . . 2) the unitized property has not sustained a significant alterati in producing patterns . . . " 42 Fed. Reg. at p. 4414.

[12] "Section 212.75, adopted on February 1, 1976, is applicable only enhanced recovery unitized properties which established a unit BPCL on after February 1, 1976." Since Section 212.75 did not contain a definition "significant alteration" until September 1, 1976, enhanced recovery un formed during that time period were permitted to continue lease by lea

The purpose of Ruling 1977-2 was to clear up certain "technical issues" which had arisen in connection with the agency's implementation of the new crude oil pricing policies set out in the EPCA, and to clarify the August 20, 1976 Notice regarding price regulations applicable to crude oil. These clarifications, of course, were designed to improve the incentives offered under the two tier pricing system. 42 Fed. Reg. at 4409.

The agency summarized separate treatments to be afforded three different types of Units, according to the date upon which each became unitized, and/or when significantly altered producing patterns occurred on the property.

The comments of the District Court upon the purposes and effect of Ruling 1977-2 succinctly sum up its provisions, 561 F.Supp., f.n. 33, at pp. 837-838:

> "Although Ruling 1977-2 is not a model of clarity, three categories of units may be distilled from it. The first category consisted of all units formed before February 1, 1976, and at which enhanced recovery operations or a significant alteration in producing patterns occurred *before* September 1, 1976. . . . (At these units) a unit BPCL had to be established as of the date the significant alteration in producing patterns occurred. *Only Section 212.72 applied to these units.* . . .
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> "The second category consisted of all units, whenever formed, at which a significant alteration in producing patterns occurred only *after* August 31, 1976. At units in this second category, as well, a unit BPCL had to be established as of the date the

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accounting until such time as enhanced recovery operations had begun. As to these units, the definition adopted in the August 20 Notice was not applicable *until* September 1, 1976, even though the alteration occurred prior to September 1, 1976. 42 Fed. Reg. at p. 4415.

significant alteration in producing patterns occurred, but such units enjoyed all the benefits of Section 212.75. . . .

"The third category consisted of units formed between February 1, 1976 and August 31, 1976 and at which either enhanced recovery operations began, or a significant alteration in producing patterns occurred, *prior to* September 1, 1976. The agency defined 'enhanced recovery' in February 1976 to include gas or liquid injection operations. 41 Fed. Reg. at 4941. The definition of significant alteration in producing patterns, which came only as of September 1, 1976, swallowed up the concept of enhanced recovery, because the new definition included 'the application of extraneous energy sources by the injection of liquids or gases into the reservoir.' . . . The agency recognized, however, that producing patterns might be altered before gas injection, and so added as an alternative definition of significant alteration 'the increase of production allowables for any property that constitutes the unitized property.' . . . .

"Because operators of units in this third category, formed after February 1, 1976, knew the definition of enhanced recovery when their units were formed, whereas 'significant alteration' was defined only in September, the agency chose to apply the two concepts differently. Operators of units at which enhanced recovery operations began before September 1, 1976 were required to establish a unit BPCL as of the date such operations began . . . But operators of units at which no enhanced recovery operations began, but where a significant alteration in producing patterns occurred, before September 1, 1976, were allowed to wait until September 1, 1976 to establish a unit BPCL. . . .

> "As a practical matter this meant that if an operator began gas or liquid injection — which would constitute both enhanced recovery and a significant alteration — the operator had to establish a unit BPCL as of that date. If there occurred only a shift in production allowables — which would constitute a significant alteration but not enhanced recovery — the operator could wait until September 1, 1976 to establish a unit BPCL." (Emphasis supplied.)

Ruling 1977-2 provided that as to the third category of units, once a unit BPCL was established, "the provisions of Section 212.75 then in effect are applicable. . . ." 42 Fed. Reg. at 4415. As noted by the trial court, "such units were not allowed any measure of imputed new oil, but they were allowed to use the special unit BPCL rule and the provisions for imputed stripper well oil." 561 F.Supp., f.n. 33 at p. 838.

Exxon claims that 10 CFR Section 212.75 may not be retroactively applied because standards for retroactivity have not been met. It claims that retroactive application of only "selected portions" of Section 212.75 is arbitrary and capricious because this creates discriminatory treatment of unitized fields, and irrationally treats "similarly situated" parties in a dissimilar manner. Finally Exxon argues that if the "significant alteration" portion of Section 212.75 is to be applied retroactively, then the beneficial portions of Section 212.75 must also be given retroactive effect.

After fully reviewing the record, we determine that the District Court correctly applied Section 212.75 in holding that a single BPCL must be adopted at the Hawkins Field in January, 1975, when it was unitized, because a significant alteration in producing patterns occurred at that time.

In the first instance, we reiterate the fact that this Court has previously determined that Section 212.72 in and of itself, required that a single BPCL be established upon unitization.

Secondly, and as found by the trial court, the agency, in rescinding the strict unit-property rule established by Ruling 1975-15, established "a completely new, although less strict, interpretation of the property definition in Section 212.72." 561 F.Supp. at 816.

Finally, and as the trial court found, Exxon suffered no prejudice or injury from substitution of the Section 212.75 test for the requirement of Ruling 1975-15 that a unit BPCL be established as of the legally effective date of the unitization agreement. Application of Section 212.75 as "guidance" to the question of significant alteration would not be more restrictive than the new February, 1976 announcement which allowed a producer to postpone unit accounting until production patterns had been significantly altered, which occurred generally upon implementation of "enhanced recovery techniques," or earlier, upon the closing-in of wells and transfer of production to other leases in preparation for enhanced recovery operations. Certainly Exxon can not claim prejudice through reliance upon any "general test" contained in the 1976 announcement, for its decision to unitize and to account upon a lease by lease basis was made in 1974, with full knowledge that Section 212.72, unaided by Ruling 1975-15, required unit wide accounting upon unitization.[13]

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[13]As noted, unit accounting had been adopted by Exxon for other Units.

PX 56, an Exxon Memo dated 2/7/74 concerned pricing policy for the Hawkins Unit:

> "... it is recommended that Exxon should begin calculating exempted unit oil on a lease basis rather than on a total field basis. These changes would prevent an 80 percent reduction in new and released oil when Hawkins is unitized ...."

Exxon next asserts that it will sustain prejudice if the Section 212.75 significant alteration test is applied retroactively because the Hawkins Field would never have been unitized if the participants had known that unit-wide accounting would be required upon unitization, since many participants would lose "new oil" which they were legitimately getting prior to unitization, under lease by lease accounting. Such after-the-fact speculation is not persuasive.

The record establishes that Exxon was well aware that Section 212.72 required adoption of unit-wide accounting upon unitization, and that this requirement was a problem to Exxon in its effort to convince all participants to join the unit. At the same time, Exxon clearly feared that *all* "new oil" would be lost because the increased MER (Maximum Efficient Rate) for the field, which had been raised by the Texas Railroad Commission, in prospect of the unitization, would be reduced to its former level if Exxon's plan for unitization fell through.[14] This threat

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PX 77, an Exxon Memo dated 8/8/74, noted that unit accounting was established in two other fields, unitized on September 1, 1973, the date that two-tier pricing went into effect, and on March 1, 1974. However, in the Hawkins Field, Exxon:

> ". . . proposed that the calculation of new and released oil be on the basis that each pre-unitization accounting lease is a separate 'property' for FEA purposes. A calculation based on the total unit would result in less new and released oil than if the field had not been unitized. . . ."

In drawing a distinction between the two other units (using unit accounting), this memo noted:

> "Hawkins unitization differs from Jay and Webster in that a large number of royalty owners have not signed up for the unit."

At that time over 75% of the 327 unit tracts in Hawkins Field had less than 100% royalty approval.

[14] PX 54 discusses the MER aspect in this manner:

> "One of our biggest problems in the unitization was that the entire project has been conducted on a highly accelerated basis, because Exxon has so much at stake. . . . As part of an interim pressure maintenance program Exxon got the Railroad Commission to increase the field

had been raised by "a number of smaller, edge operators in the field" who believed that the field MER of 112,000 barrels per day was too high. A State Hearing Examiner believed that the 1974 producing rate in the field was damaging the reservoir. In May, 1974, Exxon was concerned that the Texas Commission might reduce the MER rate of 112,000 barrels per day to 87,000. In a presentation to management in July, 1974, Exxon employees emphasized "the critical need for operation flexibility," with "substantial changes from current producing practices" so that the Hawkins Field allowable would be produced from "the more capable" wells. The possibility of a reduction in the MER for the field by 25,000 barrels per day was specifically feared if unit approval was delayed past January 1, 1975. Since Exxon owned 76% of the working interest, 19,000 barrels of this loss would fall on Exxon's interest in the field. An Exxon budget summary in November, 1974,[15] "assumed" that the Hawkins Field allowable would be cut from 112,000 to 87,000 B/D on July 1, 1975, if the field was not unitized because "(p)olitical pressure from other operators would force the Texas Railroad Commission to reduce the field rate."

Under these circumstances, there was no prejudice to Exxon which would prohibit retroactive application of the significant alteration tests of Section 212.75 as guidance in a determination of the question at Hawkins Field.

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allowance by 25,000 barrels a day. While this has increased the Company's current income considerably, the increased production is causing edge tracts in the field to deplete faster. The owners of these tracts have been threatening to ask the Railroad Commission to remove the increased allowable. Exxon has succeeded in holding this off by showing its good faith effort to get the unitization under way as soon as possible. . . . the unit has to be made effective within two years or all the past effort will be lost."

[15]The summary noted that Exxon's working interest in the Unit was 79.52% until about the second quarter of 1977 when it would drop to 75.97%. PX 92. Exxon owned about 77.8% of the field allowable.

We further find that Exxon is not entitled to the beneficial "special incentives" of Section 212.75, which, by its terms applies only to certain classes of units, not including HFU. Exxon claims that it was arbitrary to discriminate between those units formed before February 1976, and those formed between February and September 1976.[16]

The District Court recognized the disparity in treatment with these comments: (561 F.Supp. f.n. 35 at p. 839):

> "The agency articulated no reasons for acting so generously toward such units when its stated purpose was only to encourage prospective unitization . . . . One might speculate that because such units had not yet undergone a significant alteration in producing patterns, they faced a greater risk of dissolution than did units where significant and perhaps irreversible alteration had already occurred. The agency may have wished to provide particular incentives for the maintenance of such units by holding out the prospect of greater rewards. But whatever the agency's reasons, the issue of the reasonableness of extending the benefits of Section 212.75 to some units formed before February 1976 is not before the court. Even if it were, the court could at most strike down that small portion of Section 212.75 as an unjustifiable windfall to pre-existing units. *That decision would not affect the validity of the agency's decision to provide incentives for the creation of new units while denying those incentives to pre-existing*

[16]The District Court rejected Exxon's claim to retroactive benefits of Section 212.75. 561 F.Supp., at 837, n. 33. Exxon does not now claim on appeal that it is entitled to an amount of "new" and "stripper well" oil from Hawkins Field beginning in September, 1976, on account of the provisions of Section 212.75.

units like the Hawkins Field Unit. (Emphasis supplied).

Regardless of the generous treatment given to some newly formed units, the trial court determined that the agency need not give the benefits of Section 212.75 to those pre-existing units subject to the provisions of Section 212.72, since by refusing to extend greater benefits, "the agency performed precisely the delicate weighing of competing statutory objectives with which Congress had entrusted it and to which judicial deference is due." 561 F.Supp. at 839-840. We agree with the court's conclusion, found at 838-839 of 561 F.Supp:

> "Working within the narrow constraints imposed by Congress, the FEA reasonably balanced the competing aims of increased production and price control by extending the most favorable incentives to new units. Indeed, the FEA could not have treated all units alike, whenever formed. Had the FEA allowed all units, including the Hawkins Field, to benefit from the favorable provisions of Section 212.75, it would have violated the EPCA directive that no old oil be reclassified as higher-price oil unless it would not have otherwise been produced. The owners of the properties .... such as the Hawkins Field Unit made their economic decision to unitize and to pursue enhanced recovery efforts long before February 1976. Any further inducement to them would have produced no additional oil that they had not already decided was worth producing. They could not be encouraged to do what they had already done. ..."

It clearly appears that HFU, a pre-February 1976 unit which was subject to Section 212.72, was not "similarly situated" to units created later in response to new incentives for enhanced recovery operations. There was no arbitrary discrimination between two types of units which

would entitle Exxon to claim any sort of prejudice from its treatment under Section 212.75.[17]

E. The "Significant Alteration" at Hawkins Field.

Following a review of the record, we find that the trial court correctly held, as a matter of law, that a significant alteration in producing patterns occurred at Hawkins Field in January, 1975, and that Exxon was required to establish a unit BPCL at that time.

On the cross-motions for summary judgment, the Government filed its statement of material facts as to which there was no dispute, and Exxon filed its statement of "genuine issues," to be litigated at trial. The Government's statement was based upon Exxon's admissions and answers to interrogatories, transcripts and documents connected with Texas Railroad Commission proceedings, Exxon's own undisputed production, allowable and injection data from the Hawkins Field, and other contemporary documents relating to planning, production, and pricing for the unit.

Exxon, in its statement of issues to be litigated at trial, did not, and does not, on this appeal contest these facts. Instead, the argument is made that since the agency intended that the Section 212.75 definition of substantial alteration be used only as "guidance," in "flexible case by case determinations," an evidentiary hearing was required to determine the alteration question at Hawkins Field. In this respect, it is Exxon's claim that the deposi-

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[17]The trial court noted that even if extending benefits to a few units formed before February 1976 could be said to be "unfair," the most it could do was to strike down a small portion of Section 212.75 as "an unjustifiable windfall to pre-existing units." On appeal, Exxon claims that the solution to such "unfairness" would be to extend the benefits to Exxon, and not to take them away from other units. Such argument is without merit. This court will not rewrite the regulations to fit Exxon's situation. It was not similarly situated to the units which were given favorable treatment.

tion testimony of thirteen petroleum engineers refutes any conclusion that gas injection and realignment of production at the unit amounted to significant change in production methods at Hawkins Field. In Exxon's opinion, such testimony would establish that operations in January 1975 "were just a continuation of the temporary 'holding action' " that began at the Hawkins Field in 1969 to combat the waste of crude oil. According to Exxon, producing patterns in the field could not have been significantly altered until the inert gas plant began operations in March, 1977.[18]

1. *The Assignment of a Unit Allowable.* One of the definitions of "significant alteration" used as guidance by the trial court in determining the status of Hawkins Field under Ruling 1977-2 and Section 212.75, was the question of when there occurred at Hawkins Field an "increase of production allowables for any property that constitutes the unitized property."

Upon the basis of uncontradicted evidence, the trial court found that the state designated unit allowable assigned to the field in January 1975 was a significant alteration in producing patterns within the contemplation of section 212.75. As explained by the trial court at p. 843, 561 F.Supp:

> "Prior to unitization the Texas Railroad Commission . . . limited the number of barrels of oil . . . each well within the Hawkins Field could produce. When a producer-shut in an unproductive well . . . that well's allowables were transferred pro rata among all the other wells in the field. In its order approving the unitization of the Hawkins Field, the (Commission) granted the field a unit allowable and in doing so

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[18]Exxon, of course, has previously determined that unit-wide accounting was required at Hawkins Field as of *September 1, 1976.*

> relinquished to Exxon the control of allocating production among the properties comprising the unit. . . . The unit allowable permitted Exxon to transfer production from lease to lease at will, without regard to prior limits on production at any lease, provided total unit production did not exceed the unit allowable. In effect, therefore the (Commission) accorded Exxon as of January 1, 1975 an increase in production allowables for any property within the Hawkins Field Unit to which Exxon chose to transfer production, and thereby triggered a significant alteration in producing patterns as of January 1, 1975."[19]

The evidence established that Exxon immediately used the unit allowable in January 1975 by raising production above prior allowables by nearly 320,000 barrels at 65 leases, while production declined in an equal amount at 137 other leases. As found by the trial court -- "(b)y shifting production within the unit at will, with only an eye to the unit allowable limit, Exxon effectively 'transfer(red) production allowables among participating leases.' " 561 F.Supp. at 844. This, of necessity, resulted in substantial increases in "new" oil, without any actual increase in total production from the field. Prior to unitization, it was not possible for an Operator to increase production by transferring allowables from one particular lease to another, because if one well became incapable of

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[19]The Order of the Texas Railroad Commission, dated November 26, 1974, approving the unitization agreement for Hawkins Field, provided in pertinent part that:

> "It is further ordered that the proration units as established for the individual wells, within the unitized area, prior to the approval of the subject Unitization Agreement, are hereby adopted, approved and continued in effect for allowable allocation purposes for such wells, unless the unit Operator elects to revise such proration units."

When Exxon petitioned the Commission to approve the unitization, it requested a single unit production allowable for "operating flexibility" so that allowables could be transferred among tracts of Exxon's choice. PX 86.

producing its allowable, any shortfall was assigned by the state Commission to all capable wells in the field, pro rata. PX 5 at Rule 15.

Exxon does not dispute the evidence establishing this transfer of production among leases.[20] Instead, it claims that in an MER field, such as Hawkins, the "increase in allowables" portion of the "significant alteration" definition, should be construed to mean an increase in the *unit allowable.* From this proposition, Exxon then argues that since the unit allowable was the same as the pre-unitization MER for the entire field, there was no "increase in allowables."

The definition of what constitutes a "significant alteration in producing patterns" is to be applied as guidance to "all unitized properties" required to establish a unit BPCL prior to February 1, 1976. There is no exception made for units formed at MER fields, or for Exxon's particular circumstances. The preamble to the signficant alteration definition of Section 212.75 includes the following language:

> "The (significant alteration in producing patterns) exception provides that notwithstanding the requirement to adopt a unitized BPCL as of the effective date of unitization, determinations of upper and

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[20]The District Court found that by Exxon's own measurements, "almost 20 percent of 1975 production had shifted across lease lines, almost two and one-half times as much as had shifted in either 1974 or 1973." 561 F.Supp. at 844, n. 42. Despite Exxon's claim in this appeal that this finding was incorrect, the record supports the finding. See PX 200 at 2.

In January, 1975 the M.A. Kay Estate lease produced 47,531 more barrels than it had been allowed to produce on the average in any month during 1974. This was a 33.3% increase in production in that one lease. All of these barrels were treated as "new oil" under Exxon's lease-by-lease accounting. See Appendices B-1, D, "Charts and Graphs."

It is clear that such shifts of production across lease lines were the result of unitization.

> lower tier crude oil volumes may continue to be made separately for properties that comprise the unit . . . only for as long as (1) injection has not begun, and (2) *there has been no transfer of production allowables among participating leases.*" 41 Fed. Reg. at 36182, Reg. APX p. 278. (Emphasis supplied).

In *Wiggins Bros., Inc. v. Department of Energy*, 667 F.2d 77, 88 (TECA 1981), *cert. denied.* 456 U.S. 905 (1982), we noted that the District Court was not free to disregard the intention of the agency which was expressed in a preamble to Ruling 1974-29. We there stated:

> "It is well settled by decisions of this Court that the preamble to a regulation of DOE and its predecessors should be considered in construing the regulation and determining the meaning of the regulation. . . .
>
> * * *
>
> Further, there is no support for the view that, under federal rules of construction of statutes and legislative regulations, definitions in a preamble may be ignored. The rule is contrary to this view."

Exxon's rewriting of Section 212.75 would eliminate the phrase "any property that constitutes" from that section, and require the Court to find that a significant alteration occurs only when there is an "increase in production allowables for . . . the unitized property."[21] Such construction would ignore the clear language of Section 212.75 itself, as well as the manifest intent of the

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[21]The definition of "significant alteration in producing patterns" set out in the amendment to Section 212.75, effective September 1, 1976, provided in pertinent part that the term meant:

> ". . . (2) the increase of production allowables *for any property that constitutes* the unitized property." (Emphasis supplied.) 41 Fed. Reg. at 36184.

agency as expressed in the preamble to the amendment of Section 212.75, 41 Fed. Reg. 36,182.

The District Court correctly looked to agency intent, as expressed by the language of the regulation and its preamble, for the appropriate explanation of the term "increase of production allowables for any property that constitutes the unitized property." This term clearly includes a "transfer of production allowables among participating leases." Exxon did in fact so transfer production allowables in January 1975.[22]

2. *Gas Injection at Hawkins Field.* The second definition of "significant alteration" provided by Section 212.75, and used as guidance by the trial court in determining the status of Hawkins Field, concerns the injection of gas in and after January, 1975. The trial court found that:

> "... after unitization Exxon continued — and increased — the injections of natural gas it had begun in 1970. Even if Exxon had only continued to inject natural gas at the rate it had done so before unitization — or even some lesser rate — it would have engaged in 'the application of extraneous energy sources by the injection of liquids or gasses into the resevoir'— itself a significant alteration in producing patterns.... But Exxon in fact substantially increased gas injection after unitization." 561 F.Supp. at 844.

While the Railroad Commission had initially authorized injection of gas at an average of 20 million cubic feet

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[22]This was contemporaneously understood by an Exxon employee upon review of the August 1976 regulations. His conclusion was that the language contained in the preamble would be of no benefit to Hawkins Field "because of the transfer of allowable provisions" so that Hawkins would be required to begin unit calculations on February 1, 1975 with a consequence being "about a $70MM retroactive exposure for Exxon." PX 230 at 4.

per day in 1969 as a part of Exxon's "interim plan" in preparing for unitization, this limit was removed by the Commission upon unitization. The trial court summed up the uncontested data from Exxon files, in this manner:

> "... Exxon injected 28.2 mcf per day in January 1975 — 40 percent more than a year earlier. PX 177. Indeed, Exxon increased injections thereafter until by the fall of 1975 it was injecting more than twice as much gas as a year before .... Over all, in the first ten months of 1975 Exxon injected an average 36.5 mcf per day — almost an eighty percent increase over the same period in 1974 ... Comparing totals for the years 1972 through 1975 reveals the same clear jump after unitization. Although between 1972 and 1975 increases averaged only 5 percent annually, total gas injections at the Hawkins Field in 1975 leaped 82 percent, ... with the 1975 total more than double the amount for 1972...." 561 F.Supp. at pp. 844-845.[23]

In response to this uncontroverted evidence, Exxon first claims that the 1975 injection program was merely a "continuation of the interim project," and therefore there was no significant alteration in producing patterns. The evidence cited above is to the contrary.

Exxon next claims that the district court erred in making post-unitization comparisons because pre-unitization gas injection in the eastern part of Hawkins Field was omitted. The record discloses that in 1974 Texaco and Amoco were the only operators injecting gas in the eastern portion of Hawkins Field. This injection was not to maintain pressure in the gas cap, but was for the purpose of regulating proportions of gas to oil in some wells. Even

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[23]These figures come from data submitted by Exxon to the Texas Commission on December 18, 1975.

if the small amount of gas injected in the eastern field is added to Exxon's injections in the western segment, the undisputed evidence is that post-unitization injection continued a dramatic climb above 1974 rates.

Exxon next claims that the gas injected at Hawkins Field was not from an "extraneous" energy source.[24] According to Exxon, the definition of "extraneous" means "gas not produced from the subject reservoir." Since the gas injected at Hawkins was "entirely from the field reservoir," Exxon insists that there could be no substantial alteration in production patterns at the Hawkins Unit.

The District Court correctly rejected this argument, citing the preamble to the February 1976 amendments, in which it was explained that the term "extraneous" included gas recycled from the reservoir. 561 F.Supp. at 844, f.n. 43. That preamble provided, in pertinent part, that

> "In response to the proposed definition, many comments expressed concern that the language 'from extraneous sources' might preclude some types of enhanced recovery projects that recycle reservoir gas .... *The fact that the injected fluids or gases may have originated in the reservoir is irrelevant as long as they are injected by an extraneous energy source.*" 41 Fed. Reg. at 4938, R. 37585. (Emphasis supplied).

As previously noted, the definition contained in this preamble has controlling weight. See *Wiggins Bros., Inc. v. DOE, supra*, 667 F.2d 77.

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[24]As previously noted, one of the alternative tests for "significant alteration" in the September 1976 definition, used as guidance here, was "the application of extraneous energy sources by the injection of liquids or gases into the reservoir." 10 C.F.R. Section 212.75(b).

Exxon further argues that the explanation of "extraneous energy source" is somehow inapplicable, since it was intended to apply only to "enhanced recovery projects," where the injected gas would "move crude oil through the reservoir." In this respect, Exxon claims that "the continuation of the interim program at the HFU in 1975 was *not* an enhanced recovery project." Exxon brief, p. 72. Such a claim at this stage of the proceedings is startling, and without merit. In its "Statement of Material Facts," Exxon asserted that "The Hawkins Field Unit Agreement, . . . as approved by the TRRC, authorized the establishment and operation of the unit facilities necessary for enhanced recovery operations in the Hawkins Field." Various Government exhibits establish that Exxon admitted that gas injection at the Hawkins Field Unit was an enhanced recovery operation.[25]

Since the undisputed evidence established that gas injection occurred in January 1975, the trial court correctly found that a significant alteration in producing patterns at HFU occurred at that time.

F. The "Reasonable Alternative Basis" of Ruling 1977-2. After having determined that a significant alteration in producing patterns occurred at HFU in January, 1975, under both the test of an "increase in production allowables," and/or by gas injection at the field, the trial court further determined that Exxon had failed to justify another date upon some other "reasonable basis," as allowed by Ruling 1977-2.[26]

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[25]PX 68, PX 94, PX 103, PX 109, etc.

[26]In extensive briefing, Exxon claims that the trial court refused to allow it to justify an alternative date for "significant alteration of producing patterns" at Hawkins Field.

The defense was not raised in Exxon's Answer or Amended Answer, but it was raised as an "issue" to be litigated in its "Statement of Genuine Issues" to be litigated at trial.

Exxon argued that "the only truly significant alteration that occurred in the producing patterns of the Field after unitization was the permanent arrest of gas cap shrinkage and the conversion of the reservoir drive mechanism to gas drive/gravity drainage." The trial court approached the issue from this position, and determined that any alternative date which depended on lengthy testimony by expert petroleum engineers as to underground drive mechanisms was not within the intent of Congress since compliance with pricing regulations should be based upon simple objective data, readily observable by agency auditors.[27] The Court further held that since substantial shifts in production had occurred prior to any change in underground drive mechanisms, lease by lease accounting thereafter would have allowed Exxon to effectively avoid price controls:

> "... the agency's decision to define significant alteration in producing patterns in terms of easily observable events is consistent with the intent of Congress that administration of price controls be workable and effective. The FEA with its limited resources could not afford to satisfy Exxon's desire that the agency send droves of petroleum engineers to the Hawkins Field to conduct elaborate tests to examine the field's underground drive mechanism. That is precisely the 'quagmire' that the agency had to avoid ...." 561 F.Supp. at 841.

* * *

While the trial court noted that the question was not before it, the issue was in fact considered and determined adversely to Exxon.

[27]Exxon contended that no significant alteration occurred at Hawkins Field "until the injection of inert gas stablized reservoir pressure and altered the reservoir's underground drive mechanisms, *sometime in 1979*." 561 F.Supp. at 840. (Emphasis supplied.)

> "To allow lease by lease accounting to continue after such shifts would have enabled unit operators to circumvent oil price controls. To require the agency to adopt a subjective test based on complex geological phenomena would have plunged the agency into an administrative quagmire which would have had the same result. The agency definition of significant alteration was a reasonable effort by the agency to fulfill its 'duty to reasonably inhibit gerrymandering of boundaries undertaken to avoid price controls.' *Pennzoil Co. v. DOE, supra,* 680 F.2d at 169. Accordingly it must be upheld." 561 F.Supp. 843.

On this appeal, Exxon now claims that *March, 1977,*[28] the month the gas plant began operation, is a reasonable alternative date, although its own records show that it calculated a unit BPCL in September, 1976 upon its own finding that a significant alteration had already occurred.

We reject this argument for two reasons. First, and of most importance, any meaningful comparison of production levels between "old" and "new" oil on a lease-by-lease basis became impossible once production across lease lines began in January, 1975. Any date based upon completion of and operation of the gas plant in 1977 would not be a reasonable alternative date for determining the question of when a significant alteration in producing patterns occurred at Hawkins Field.

This Court has previously recognized that:

> "The realignment of the pattern of production would have played havoc with the federal pricing system had FEA permitted lease by lease property designations to continue in force after a unitization.

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[28]Exxon continues to shift ground, and refine its arguments in this appeal. As previously noted, the alternative date presented to the trial court was "sometime in 1979."

> It would have resulted in the recognition of artificially high quantities of new oil from some of the participating leases while other leases would be producing less or not at all. It would have permitted an operator to gerrymander production patterns by shifting producing wells from one lease to another." *Department of Energy v. State of Louisiana*, 690 F.2d 180 at 190, (TECA 1982), *cert. den.*, 460 U.S. 1069 (1983).

See also, *Pennzoil, supra*, 680 F.2d at 169; *Grigsby, supra*, 585 F.2d at 1083.

We will not reiterate the evidence recited by the trial court concerning the shutting in of wells, and transfer of production from one lease to another following unitization of Hawkins Field. Exxon personnel, in a report dated June, 1975, attributed the increased volumes of "new oil" directly to unitization. This conclusion was repeated in various Exxon documents.

The Court is satisfied that given the extent and nature of the changes in Exxon production methods once unitization had been accomplished, it became impossible to make any meaningful comparison of "new oil" production on a lease-by-lease basis, long before the commencement of inert gas injection in March 1977. Therefore, no reasonable basis exists for making that occurrence an alternative date for computation of a BPCL at Hawkins Field.

In addition, we fully agree with the trial court's conclusion that any resort to the testimony of expert petroleum engineers for the purpose of determining a reasonable alternative date for a significant alteration in production methods at Hawkins Field would be unworkable, and therefore, not a reasonable basis for determination of the question. Such a method of ascertaining the question would be completely impossible to "audit." We believe

that the "key event," as found by the trial court, was the "realignment of producing patterns" among the various leases.

The determination of *when* the significant alteration occurred at Hawkins Field was correctly determined by the trial court, as a matter of law.

IX.

The Extent of Exxon Liability

The District Court, relying upon our decision in *Sauder v. Department of Energy, supra,* 648 F.2d 1341, determined, on the basis of undisputed testimony, and Exxon's own documents, that since Exxon caused the overcharges, it is fully liable for all of them.

In this appeal, Exxon contends that the principle of operator liability set out in *Sauder* does not apply. In addition, Exxon advances other arguments for the proposition that in any event it should be relieved of certain portions of the overcharges and interest.

We first review the *Sauder* case.

A. The Sauder Rationale: Operator Liability.

In *Sauder,* the Operator owned 34 percent and 41 percent interests in two properties where exempt stripper well oil was wrongfully claimed. We held that he was liable for all overcharges attributable to the two leases, even though other interest owners had in fact received the majority of the profits.[29] We held that:

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[29]In *Sauder* the total overcharges amounted to $342,589, plus interest. Sauder claimed that he was liable only for $133,000, his share of the total.

"Of all the working interest owners, (Sauder's) is by far the largest single holding. He is the sole operator of the leases and has been the animating force behind the continued production at the Bradfield Pool . . . . It can fairly be said that it was he who caused the overcharges.

In these circumstances, we think that it is within the authority and discretion of the agency to hold the owner-operator of a lease liable for the full amount of the overcharge. To require the agency to seek refunds from each individual property owner would place a heavy burden on the agency, limiting its ability to repair infractions of its pricing rules. Shifting the burden to one in Sauder's position of responsibility aids the task of enforcement without working unfairness." (648 F.2d at 1347-48)

In applying *Sauder* to the Hawkins Field situation, the trial court summed up Exxon's situation in this manner:

". . . Disputing its role as the animating force at the Hawkins Field, Exxon argues that under the terms of the Unit Agreement each Hawkins Field interest owner takes its share of production in kind and independently determines the price at which to sell the oil. Exxon's description of itself as just another interest owner is disingenuous. Exxon was the prime mover and animating force behind the formation and operation of the Hawkins Field Unit and, under the rule of *Sauder* . . . Exxon may be held responsible for all overcharges at the field." 561 F.Supp. at 849.

The trial court emphasized that:

"The factual basis for holding Exxon responsible for the full amount of the overcharges at the Hawkins Field is even stronger than in *Sauder*. Throughout

> the relevant period Exxon's working interest at Hawkins ranged between 76 and 80 percent; its share of unit production, when including royalty interest owners, was about two-thirds. . . . Exxon was the animating force behind formation of the Hawkins Field Unit, having begun to promote it as early as 1969. . . . Exxon sought and received permission in 1969 to inject natural gas into the field, which it began the following year. . . . As operator, Exxon chose the wells to shut-in, the wells where production was to go up or down, where to inject gas, and how much. . . . Most important, Exxon decided how the unit would account for upper and lower tier oil, first in 1974, before the field was legally unitized . . . later after Ruling 1975-15 was issued, . . . and finally when it switched to a unit BPCL under Section 212.75 in September 1976. . . . Accordingly, Exxon may 'fairly be said (to have) caused the overcharges.' *Sauder v. DOE* . . . . " 561 F.Supp. at 849-850.

The undisputed evidence, so ably summarized by the trial court, supports the conclusion that Exxon is responsible for all of the overcharges under the rationale of *Sauder*. To require the Government to gather evidence and to bring multiple actions against more than 200 working interest owners, and 2200 royalty interest owners at Hawkins Field would "plunge the agency into an 'administrative quagmire' which would effectively block enforcement of oil price controls at the Hawkins Field." 516 F.Supp. at 850.

In this appeal Exxon now takes the position that it cannot be liable for various portions of the liability because it was acting merely as the *agent* of other interest owners, and the trial court failed to determine first that Exxon would be entitled to contribution or indemnifica-

tion from all other owners who benefited from the overcharges.

While Exxon did not raise the "agency" issue as such in the summary judgment proceedings, and the issue was not specifically discussed by the trial court at 516 F.Supp., Exxon has always resisted the suggestion that it is liable as unit operator for the sales of other interest owners in the Hawkins Field. When Exxon earlier disclaimed its liability as an operator by means of a motion to have this case dismissed for lack of indispensable parties, contending that the rights of other interest owners were at issue and might be adversely affected because they would be liable for contribution and indemnification should Exxon be found liable, the trial court fully examined the nature of Exxon's liability as operator under the *Sauder* ruling, and discussed the question of Exxon's right to contribution or indemnification from other owners in the field. *United States v. Exxon Corp., supra,* 94 F.R.D. 252, 257-258, (1981):

> "As long as the principal owner-operator caused the overcharges, *Sauder* allows complete recovery from that party, regardless of whether it is actually in possession of the monies received pursuant to the overcharges.
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> "Similarly, under Rule 19(a)(2)(i), the court's analysis of *Sauder* means that the interests of other unit owners in this case will not, as a practical matter, be impeded. *The court's ultimate disposition of the case will find Exxon liable for those overcharges which Exxon has caused; the decision will not rule upon the actions of other interest owners and, therefore, could not be employed as precedent to hold them liable in the future. That Exxon may attempt to seek indemnification or contribution from the other interest owners for part of the overcharges the court determines Exxon*

has been responsible for does not alter the court's conclusion.

"Such a suit by Exxon would turn upon the specific reimbursement agreements entered into by the parties, *agreements not at all at issue in the instant case.* Furthermore, if the disposition of this case has any effect upon a subsequent reimbursement suit by Exxon, it may be to *assist* (emphasis of the court) the other interest owners. A finding by the court that Exxon could be found *solely* (emphasis of the court) responsible for all overcharges could arguably aid other interest owners in defending against a suit for contribution or indemnification." (Except as noted, emphasis supplied).

The above decision was not appealed by Exxon. It has now been found that Exxon caused the overcharges. The trial court did note that Exxon "is not without recourse against the other interest owners, and so imposing full responsibility on Exxon will aid in enforcement of price controls without unfairness to Exxon." 561 F.Supp. 850. With regard to this observation, it was noted that Exxon had twice warned other interest owners that recomputations of payments might become necessary because of its interpretation of pricing regulations,[30] and Exxon itself

[30]PX 145, an Exxon letter to interest owners in October, 1975, warned that these interest owners might be required "to refund excess amounts received for oil heretofore classified as 'new crude oil' which the FEA may rule does not quality for exempt pricing."

PX 246, an Exxon letter to interest owners in January, 1978, sent after a Notice of Probable Violation was filed by the DOE, warned that if a remedial order was issued "it will probably be necessary for Exxon, pending the outcome of the controversy" to reduce payments on future production and take action "with respect to alleged past overpayments as may be necessary . . . ."

believed that any potential losses because of overpayment could be recovered.[31]

This notation by the trial court was not an attempt to determine the nature or extent of Exxon's right to contribution or indemnity, if any, and it certainly was not an adjudication of the rights or liabilities of absent interest owners not parties to the litigation.[32]

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[31]Exxon's decision to proceed with lease-by-lease accounting was based in part upon its belief that it could cut its losses in this manner: (PX 172 at 2.)

> "Potential losses via overpayments of working and royalty interest owners are minimal since most of these are financially responsible parties, and all payments are backed by reserves."

[32]Our opinion in *Exxon Corp. v. United States, supra,* 655 F.2d 1112, reviews in detail the progress of Hawkins Field litigation through the District of Columbia and the state and federal courts in Texas.

In January, 1978, a Notice of Probable Violation in Hawkins Field was issued, and Exxon and several royalty owners filed suit in the Northern District of Texas seeking declaratory relief on the same issues raised in the Notice. In June, 1978, the DOE withdrew its NOPV, and elected to proceed in this action for civil penalties and restitution under Sections 208, 209 of the ESA. Exxon's declaratory judgment action was transferred to the District of Columbia, whereupon it was dismissed by Exxon and its co-plaintiffs.

In August, 1980, Exxon moved to dismiss the D.C. action for lack of indispensable parties. The trial court held that motion in abeyance, pending the TECA decision in *Sauder*. In October, 1980, Exxon notified HFU royalty owners it would begin to withhold 40-45% of the payments due under purchase agreements to meet possible overcharge liability in the D.C. case. Exxon then filed its Counterclaim in Interpleader in the D.C. case (discussed, infra).

Some royalty owners (known as the "*Jarvis* plaintiffs") then filed suit against Exxon in Texas state court for conversion and breach of contract. Exxon removed the case to the E.D. of Texas in November, 1980, and filed a counterclaim, joinder and third party action against the DOE, raising the same issues as those involved in the D.C. action.

Following further maneuvering by the parties, all cases were brought before the TECA for the purpose of resolving the "procedural maze". In the exercise of our supervisory powers, we ordered that litigation proceed first in the District of Columbia on the pricing and regulation issues.

We determined that the *Jarvis* plaintiffs were not indispensable parties to the D.C. litigation, but we further held that if these plaintiffs desired "an earlier determination" of their claims, they would be *permitted* to intervene in

The trial court only observed that "(s)hould Exxon turn to the other Hawkins Field interest owners for contribution or indemnification Exxon, like Sauder, *could attempt* to deduct the other interest owners' share of the overcharges from future royalty payments." 561 F.Supp. at 850. (Emphasis supplied). This is not to say that Exxon's attempt would be successful, or that the government must prove that it would be successful, prior to a finding that a right to restitution has been established. The Section 209 action now before us is not the vehicle for determination of Exxon's rights against, or obligations to third parties. To find otherwise would only serve to embroil the agency in collateral matters, and "hinder, disrupt, and render torpid the statutory scheme for expedited enforcement of pricing controls." *Dyke v. Gulf Oil Corp.*, 601 F.2d 557 at 567, (TECA 1979), *Gulf Oil Corp. v. Dyke*, 734 F.2d 797 (TECA 1984), *cert. den.* 105 S.C. 173.

For all of the reasons discussed above, we find that the trial court correctly determined that Exxon is solely liable for overcharges which it caused at the Hawkins Field Unit, and that this liability is not dependent upon a finding that Exxon is entitled to contribution for such overcharges from other interest owners in the field.

B. The Amount of the Overcharges.

The trial court found that the calculation of Exxon's overcharges became a straightforward accounting matter and found that the DOE calculations "accorded Exxon the benefit of every favorable modification of the applicable regulations, even if not claimed by Exxon." There was

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the D.C. action, and move for summary judgment. *Exxon Corp. v. United States, supra*, 655 F.2d at 1118.

None of the *Jarvis* plaintiffs intervened in the D.C. litigation to press their claims. (Brief for United States at p. 81).

no challenge to the mathematical accuracy of the government's calculation, and the trial court accordingly accepted the figure of $895,501,163.85 as the correct total of all overcharges. 561 F.Supp. at 857.

In this appeal, Exxon contends that the amount of its liability, as described in the judgment, is "grossly overstated" for a number of reasons.

1. *The Texaco Production.* Exxon claims that it has no liability for the share of Hawkins Field production "owned, taken in kind, and refined or sold by Texaco, Inc." The amount of the overcharges attributable to the Texaco share is said to be $53,329,574, before interest.

The trial court correctly disposed of this contention upon the basis of our ruling in *Sauder.* 561 F.Supp. at 850, f.n. 52. In *Sauder* we relied upon *Tenneco Oil Company v. Federal Power Commission,* 442 F.2d 489 (5 Cir. 1971) in which the Court found that Tenneco was liable for all excess charges for natural gas, including payments made to its co-owners or its predecessor. We disposed of Sauder's argument that a restitution order may not require a refund of money not actually received in this manner:

> "Sauder argues that the common law concept of restitution does not encompass the restoration of benefits unjustly received by third parties, and that the agency and the court have undertaken to read a damage remedy into the statute.
>
> We disagree. . . . We now hold that it is within the agency's authority to order an owner-operator in a situation such as Sauder's to make restitution of the total overcharge." 648 F.2d at 1348, 1349.

It is entirely clear that in the case of the Texaco production, uncontested facts establish that Exxon did "cause" the overcharges attributable to the Texaco inter-

est in Hawkins Field. During the first four months of 1975, Texaco calculated the amounts of "new" and "old" oil, using a unit BPCL. Because Exxon was pricing other oil from the field upon a lease basis, it was paying larger royalties than Texaco for "new oil." As a result, some royalty owners threatened to sue Texaco. This caused Texaco to adopt Exxon's method of calculation, and to allow Exxon to determine the breakdown for Texaco's production share for the remaining period of price controls.

Exxon's claim that it is entitled to a reduction in its liability on account of the Texaco production is without merit.

2. *The Interpleader Action: Overcharges October, 1980 - January, 1981.* Exxon complains that it can not be held liable for overcharge amounts "that were never paid or received" by anyone. In this respect, Exxon claims that during the period from October, 1980, until the end of price controls on January 28, 1981, it suspended payments to those Hawkins Field interest owners from whom it purchased crude oil of all amounts in excess of a price derived from unit-wide accounting, as opposed to lease-by-lease accounting, so that during this period, Exxon paid only the price for crude oil that was permitted by the regulations under the agency's theory, and as permitted by the trial court.

With its Answer to the complaint filed by the Government in this litigation, Exxon filed a petition and counterclaim for interpleader and declaratory relief, tendering into Court "amounts equal to the disputed amounts resulting from all purchases of Unit crude oil by Exxon" pending a determination of the rights of all claimants to the disputed funds. It was noted that the owners of the crude oil were claiming that they were entitled to the full amount of the prices they had been receiving, including

the portion that the DOE claimed to be overcharges. It was further noted that certain of these interest owners had sued Exxon in Texas, seeking a declaration that they were entitled to receive the full amount of the prices they had been receiving. *Exxon Corp. v. United States, supra,* 655 F.2d 1112 (the *Jarvis Christian College* litigation in Texas).

In connection with this Interpleader, bonds totaling $20 million were filed to secure the suspended payments pending resolution of the controversy.

In its Reply to the Proposed Judgment, Exxon claimed that the sums bonded into Court pursuant to the Interpleader action either should not be included in the overcharge amount set out in the judgment, or should be applied in partial satisfaction of the judgment. The amount of this credit or reduction in the judgment sum is said to be $18,039,585, the total of such suspended payments.

The Government responded in this manner:

> "Exxon's argument . . . that because it established a $20 million bond when it filed a questionable interpleader action, it should have its liability reduced, is difficult to phanthom. In any event, Exxon's argument is premised upon the company's blatantly incorrect contention that, because the firm suspended certain payments to those HFU interest owners from whom it purchased crude oil during the period of October 1980 through January 27, 1981 'no overcharges were caused' during the period covered by the interpleader action. . . . Exxon ignores the fact that, although the company suspended certain payments to the interest owners, Exxon reported the higher illegal price to the Department's Entitlements Program as its cost of acquiring this oil . . . Hence,

> Exxon benefited substantially from the higher illegal price which it set and these suspended amounts constitute overcharges. . . . "

The operation of the "Entitlements Program," 10 C.F.R. Section 211.67, and its effect upon sales and certification of old and new oil in the Hawkins Field, was ably described by the trial court, 561 F.Supp. at 852:

> ". . . Exxon's portrayal of itself as victim ignores the workings of the mandatory Entitlements Program which, together with price controls on refiners, resellers and retailers, allowed Exxon to spread the cost of its Hawkins Field overcharges across the land. The purpose of the Entitlements Program was to permit all refiners to share the financial benefits of the limited available quantity of relatively inexpensive price-controlled crude oil. Under the Entitlements Program, the FEA each month allotted to each refiner a certain number of entitlements, equal to that refiner's deemed share of the old oil refined nationwide during that month. If a refiner was in fact able to obtain and refine a proportionately large amount of low-priced old oil, greater than its allotted entitlements, that refiner would have to buy entitlements from those less fortunate refiners which refined a proportionately small amount of low-priced oil. The price of an entitlement was roughly the difference between the price of controlled and uncontrolled oil. The effect of the entitlements transfers, therefore, was to equalize the average weighted crude oil costs of all refiners.
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> * * *
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> "As a result of Exxon's misclassification, less old oil was reported to the Entitlements Program. DOE therefore issued fewer entitlements to each refiner, and each refiner had to purchase more, or sell fewer,

> entitlements than it would have if Exxon had properly classified the Hawkins Field oil. Exxon, by improperly classifying old oil as new oil at the Hawkins Field, thereby increased the average cost of crude oil of all refiners. At the same time, although Exxon as refiner appeared initially to bear the burden of the overcharges of Exxon as producer, in fact Exxon was able to keep the ill-gotten gains by improving its entitlements position. It was able to buy fewer or sell more, entitlements than it had a right to."

Following our review of the record, and in consideration of the workings of the Entitlements Program, as described by the trial court, we agree with the Government's assertion that the fact that Exxon may have suspended payment of "overcharges" attributable to shares of production which it purchased from other interest owners during the period of October, 1980 to January, 1981, does not mean that there were no overcharges during that period. According to Exxon, the money was still due to be paid, and "Exxon reported (and was reimbursed on the basis of) the higher (illegal) price when Exxon reported that oil to the Entitlements Program." Plaintiff-Appellee Brief, p. 93, f.n. 118.[33] It is clear that in this manner, overcharges attributable to Exxon's purchase of production from other interest owners although never paid to other owners during this time period, were spread throughout the industry by the operation of the Entitlements Program.

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[33]Thomas Reeves, an accounting supervisor in Exxon's "Supply Controllers" Department, was responsible for certification of crude oil available for disposition through Exxon Pipeline Company, including production purchased by Exxon from others for processing at an Exxon refinery. He testified that "the higher values" would have been reported under the Entitlements Program.

At the request of Exxon, it was excused from responding to any motions filed concerning its petition and counterclaim in Interpleader, pending further order of the Court. Order, August 20, 1981. A further order was entered by the trial court on November 18, 1981 holding in abeyance all further proceedings in the interpleader action.

The Government points out that Exxon can dismiss its interpleader action at any time, and recover its bond. Exxon has not paid into court any money pursuant to this interpleader, and certainly at this time there is no cash interpleader fund available to be applied as a credit on the judgment entered in this action. Exxon is not entitled to any reduction in the amount of the judgment on account of its suspension of payments to other interest owners.

Exxon also contends that the judgment entered below improperly includes the production of some interest owners who were not parties to the Hawkins Field Unit Agreement. Our review of the record discloses that this new argument, presented by a footnote to the Exxon brief, was not properly raised or preserved for our review on appeal.

3. *Consent Orders.* Exxon claims that it is entitled to a reduction of its liability at least in the approximate amount of $70 million because it cannot be held liable for overcharges attributable to the interests of others in Hawkins Field who have previously entered into consent orders with the Department of Energy.

The consent orders in question were entered into with such companies as Mobil, Standard Oil of Indiana, Sun Company, Houston Oil and Minerals Corporation, Lyons Petroleum, American Petrofina, and Conoco.

These so-called "global settlements," such as the one entered into with Standard Oil, whose subsidiary, Amoco Production Company held an interest in Hawkins Field, contained provisions to the effect that the agency released "completely all administrative and judicial claims, demands, liabilities, causes of action or other proceedings that (DOE) has asserted or may be able to assert against Standard arising, before or after the date hereof, out of any federal petroleum price or allocation requirement," for the period covered by the consent Order. (3/6/73-12/31/79)

Exxon contends that the settlements have the effect of releasing any claims that the agency might have had against other interest owners at Hawkins Field, and that the settlements also "cured" any violations which such companies may have made in pricing "new oil" at the field. According to Exxon, such releases bar the agency's "effort to impose derivative liability" upon Exxon as the operator, and "purported agent" of the released companies. Exxon's theory of "vicarious liability" is stated in this manner:

> "The only legal basis upon which Exxon could be held liable for the alleged overcharges attributable to these interest owners' shares of HFU production is that Exxon supposedly acted on behalf of these interest owners in the disposition of their shares of HFU production: i.e., the apparent vicarious liability that stems from the DOE's theory of operator liability. However, because these purported 'principals' have obtained releases from the DOE settling any claims that might be asserted against them, there is no basis for holding their purported 'agent' (Exxon) liable." (Exxon Reply to Proposed Judgment).

As an alternative argument, Exxon contends that the settlements, with parties who are jointly liable with Ex-

xon, reduce the Government's "potential recovery from (a) non-settling defendant . . . ," in this case — Exxon.

It appears that the issue of consent orders was first raised by Exxon in a memorandum in support of its motion to dismiss for lack of indispensable parties filed in August, 1980. In urging that any judgment in the action could not avoid prejudice to absent parties, Exxon pointed out that the court did not "have before it the affirmative defenses of the absent interest owners." In this regard Exxon, referring to consent orders with Standard and Mobil Oil Companies, claimed that "the DOE seeks to recover from Exxon monies previously received by those interest owners and made an integral part of their settlement agreements with the agency." It was also argued that "(o)ther interest owners may have additional affirmative defenses, such as claims of estoppel and limitations, which cannot be presented in their absence."

In ruling on the motion to dismiss, the trial court, noting our order permitting the *Jarvis* plaintiffs, as well as "all other interest owners" to intervene in the District of Columbia, if they wished to do so,[34] found that the other interest owners would not be prejudiced by not being joined, and further found that Rule 19(b), Fed. R. Civ. Proc., did not require dismissal of the Government's action, even if the parties should be joined under Rule 19(a). *United States v. Exxon, Corp., supra,* 94 F.R.D. at 259.[35]

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[34]Our Order in *Exxon v. United States, supra,* 655 F.2d 1112, at 1118, provided:

> "(3) All plaintiffs in the action in the Texas court *and all other interest owners in the HFU involved in these actions* shall be permitted to intervene in the District of Columbia action if they wish to do so." (Emphasis supplied)

[35]Rule 19. Joinder of Persons Needed for Just Adjudication.

Our examination of the Consent Orders contained in the Record reveals that Exxon was not a party to any of the settlements, it did not pay any sum of money to the Government for release of any Exxon liability under these settlements, none of the consent orders mentions Exxon, or the Hawkins Field Unit, and, although some of the consent orders identify certain litigation terminated by the settlements, none mentions this litigation which was pending in the District of Columbia at the time the consent orders were executed. In the settlements, the Government agreed not to bring suit "against" the settling parties, and in the Conoco agreement "only civil claims by DOE against Conoco" were settled, while the Sun consent order only required the DOE to terminate actions "against Sun." None of the consent orders could, or did they, purport to release Sun, Conoco, etc., from suits by private parties for damages under Section 210 of the ESA, or for their liability to other parties, if any, for

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(a) Persons to be Joined if Feasible. A person . . . whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

contribution, indemnification, unjust enrichment, or for other relief. Cf. *City of Long Beach v. Department of Energy*, Nos. 9-85, 9-86 (TECA 1/4/85) ____F.2d ____.

Any rights under the consent orders accrued solely to the settling parties and not to Exxon. None of the settling parties sought to intervene in this action to assert those rights against the Government, and we do not find that Exxon has ever been given authority as agent to do so on their behalf.

It is readily apparent that Exxon's concern about settlements which may have been made by companies who are not parties to this litigation is in fact a concern about whether or not it will be successful in any future attempt to seek contribution or indemnity from those parties on account of any payment Exxon might make upon the judgment here. As we have previously pointed out, Exxon's liability is not a vicarious one, based upon ordinary notions of "agency." It has been found that Exxon was the "animating force" responsible for violating the crude oil pricing regulations, and this liability is not dependent upon finding of "joint liability" on the part of third parties who are not defendants in this action, or upon proof of Exxon's right to contribution or indemnity from those third parties.[36]

Under these circumstances, we conclude that Exxon's claim that it is entitled to some adjustment in liability on account of consent orders and settlements made between

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[36]Sun Co. and Conoco have filed two suits in the District of Delaware seeking enforcement of consent orders which they entered into with the Department of Energy. *Sun Co., Inc. v. United States*, No. 83-204; *Conoco, Inc. v. United States Dept. of Energy*, No. 83-438. The Court has considered copies of preliminary orders entered in those cases which have been furnished by counsel, and determines that issues pertaining to Exxon's right of contribution, if any, from third parties are not now a subject of consideration by this Court.

the Government and others not parties to this case is without merit.

C. Prejudgment Interest.

In the exercise of its equitable powers, the trial court determined that restitution by Exxon of overcharges should be made, with interest from the date of overcharge, in order to deprive Exxon of "all enrichment obtained at the (victims') expense," such enrichment necessarily including "the benefits Exxon obtained by having the use over the years of the money illegally obtained." 561 F.Supp. at 858.

The Government proposed several alternative rates, such as the prime rate, the schedule of interest rates which had been applied by the DOE in administrative actions since February, 1980, or a rate based upon Exxon's annual average rate of return, after tax, for capital employed in domestic production from 1975-1981, which was 23.7%.

The Court adopted and applied the schedule used by the Federal Energy Regulatory Commission in administrative enforcement actions, which fluctuated at three month intervals from 9% to 20.31%, and which had, since October, 1979, been based on average prime rate values as determined by the Federal Reserve. Such rates were imposed upon a finding that these would have been the rates imposed had the overcharges been assessed by Remedial Order, following administrative review, and because these rates had a reasonable relation to the value of the overcharges caused by Exxon. 561 F.Supp. at 858, 864.

For the first time in this appeal, Exxon, relying upon *Eastern Air Lines, Inc. v. Atlantic Richfield Co.*, 712 F.2d 1402, (TECA 1983), *cert. den.*, ____ U.S. ____, 104 S.Ct. 278 (1983) claims that assessment of any prejudgment

interest in this case is error.[37] In *Eastern Air Lines*, a private action for damages under Section 210 of the ESA, the trial court denied a claim for prejudgment interest when the amount of damages claimed to be due was uncertain. Affirming this ruling, we found that "(a)t all times during this litigation it was evident that the amout claimed by Eastern was the subject of great uncertainty, and it would be inequitable and unjust to make such an award in this case." 712 F.2d at 1410.[38]

More recently we found it to be error to award prejudgment interest in a private action under Section 210, when the ultimate amount of overcharges was "subject to great uncertainty." *Gulf Oil Corp. v. Dyke*, 734 F.2d 797, 806, *supra*, (TECA 1984) *cert. den.*, 105 S.Ct. 173. See also, *Zahir v. Shell Oil Co.*, 718 F.2d 1567 (TECA 1983), another private action involving disputes between a gas supplier, franchisee and dealer in possession of gas station franchise, where the damage claim was "not for a liquidated or readily liquidatable sum." We there found that the trial court *did not abuse its discretion* in declining to award prejudgment interest. 718 F.2d at 1573.

Eastern Air Lines, etc. are clearly distinguishable in that they involved private actions for damages, and not claims for restitution brought by the Government under Section 209 of the ESA. Indeed, in *Eastern Air Lines* we relied upon *Belcher v. Birmingham Trust National Bank*, 488 F.2d 474, 478 (5 Cir. 1973) which applied state law, for our conclusion that "prejudgment interest is not available where the amount of damages claimed to be due

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[37] *Eastern Air Lines* was decided by us in June, 1983, after judgment was entered in this action.

[38] Considerable difficulty was had in establishing base prices, and in determining the meaning of certain prices listed on computer printouts. See f.n. 11, p. 1407, 712 F.2d.

is uncertain." 712 F.2d at 1410. *Belcher* involved a claim by an appraisal company for services rendered in valuing a corporation's assets. In granting a fee, the trial court included prejudgment interest as part of the award. The Fifth Circuit determined that interest was improperly included because of the applicable state rule in Alabama that interest is not allowed on unliquidated demands.

We need not concern ourselves with any discussion of varying circumstances which may surround the award of damages under state law or under Section 210 of the Act. In *Sauder,* the Remedial Order at issue ordered Sauder to refund "overcharges in the total amount of $342,589.00 plus interest accrued on unrefunded overcharges" at certain specified rates. In overruling Sauder's complaint that he should not be liable for interest, the trial court ruled that such payment was appropriate:[39]

> "Section 209 of the ESA . . . gives the Court power to grant an injunction against Sauder. The statute goes on:
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> > 'In addition to such injunctive relief, the court may also order restitution of moneys received in violation of any such order or regulation.'
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> "The statute does not provide for the payment of interest on the moneys received. On the other hand, . . . courts have imposed interest in situations involving agency orders without express statutory permission.
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> "The same reasoning applies here. Sauder has had the use of the money which was overcharged to

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[39] *Sauder v. DOE,* 4 Energy Mgmt. (CCH) Para. 26,157, at p.27,397 (D.C. Kan. 1979).

> Mobil, and Mobil has been deprived of that use. Therefore, to make Mobil whole, interest on the $342,589 was properly ordered by FEA. The Court will order Sauder to make refunds to Mobil plus interest, in the percentages ordered by the agency."

In affirming the trial court in *Sauder,* we did not separately discuss the issue of prejudgment interest, but our approval of the interest award is inherent in our ruling there regarding the equitable powers of the court and agency "to set things right":

> "Equitable pricing is one of the important objectives of the Emergency Petroleum Allocation Act, 'and this objective cannot be bogged down in an administrative quagmire.' . . . Congress has explicitly given the courts 'equitable power . . . to set things right and order restitution,' in instances of overcharging. . . . The district court's order enforcing the agency's decision is fully consistent with this grant of authority." 648 F.2d at 1348. (citations omitted).

In discussing the scope of Section 209 of the ESA, we further observed that:

> ". . . even if the statute is construed strictly, it appears that the agency's action is within its grant of authority. 'In equity, restitution is usually thought of as a remedy by which defendant is made to disgorge illgotten gains *or to restore the status quo,* or to accomplish both objectives.'
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> * * *
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> "Here the agency seeks only 'to restore the status quo' and 'to set things right.' It does not seek to recover Mobil's *damages,* which may or may not be the amount of the overcharges, but asks Sauder to

make restitution of the precise amount of the overcharges paid to all property owners plus interest.

> Nor do we believe that Congress intended to limit the agency's and courts' power to restore overcharges. The legislative history indicates that the explicit reference to restitution in Section 209 was to settle any doubt that 'there was an inherent equitable power in the court to set things right and order restitution. . . .' There is no indication, however, that the section thereby attempts to limit the power of the courts or the agency to restitution or to a particularly strict interpretation of restitution. 'Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity the full scope of that jurisdiction is to be recognized and applied. . . .' (648 F.2d at 1348). (Emphasis of the court; citations omitted).

Exxon further suggests that it was improper to award interest of any kind in this instance, inasmuch as the judgment here should be considered in the nature of a *penalty,* upon which interest may not be allowed. This argument is based upon Exxon's specious argument that since the trial court did not trace injury to specific victims, there were no "victims" and hence there could be no order of restitution. From this, Exxon claims that an award to state governments, which were not themselves "victims" of overcharges, was in fact an imposition of a penalty and not an award of restitution.

As previously noted, the trial court determined that civil penalties would not be imposed upon Exxon. The Government has not pursued that remedy on appeal. As will be noted in our discussion, *infra,* the court found the ultimate victims of Exxon overcharges to be the consumers of this nation, and its order distributing the recovery

of overcharges employs the state governments merely as conduits for such distribution.

We conclude that the award of prejudgment interest under the circumstances of this case was clearly within the discretion of the trial court. We further conclude that the award of such interest, at the rates selected by the trial court in Appendix II to its opinion, 561 F.Supp. at 864, was not an abuse of such discretion, and there was no error.[40]

D. Equitable Considerations.

Exxon has presented, as a separate issue, its contention that the trial court, as a court of equity, erred in requiring restitution of the full amount of the overcharges with interest. In particular, Exxon complains that the court could not determine what was "equitable" without conducting an evidentiary hearing and thereafter "balancing the equities" under the facts presented at such hearing.

The essence of this claim is Exxon's contention that the trial court ignored its own conclusions that the Exxon unitization program was "undertaken for bona fide business reasons" which had begun "long before any regulations on crude oil prices existed," and that Exxon

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[40]Exxon contends that for the period from January 1, 1975 through August 26, 1982, interest should be computed as simple interest in accordance with rates established by the IRS in assessing delinquent tax accounts at the following rates:

Period	Rate
January 1, 1975 through June 30, 1975	6%
July 1, 1975 through January 31, 1976	9%
February 1, 1976 through January 31, 1978	7%
February 1, 1978 through January 31, 1980	6%
February 1, 1980 through January 31, 1982	12%
February 1, 1982 through August 27, 1982	20%

On the prejudgment interest issue, we adopt the able reasoning of the trial court set out at pp. 857-858, 561 F.Supp.

"accurately represented its conduct to the agency," and at times received from the agency informal and puzzling replies to Exxon's inquiries. Exxon further points to alleged "confusion" in interpretation of the regulations, its right to certain amounts of "new oil" which it lost because of unitization under the court's interpretation of the regulations, and its reiterated complaint that it was inequitable to refuse to extend the benefits of Section 212.75, when the "burdens" of that section were applied retroactively.

The trial court's findings regarding the retroactive impact of Section 212.75 have been fully discussed and determined, *supra.*

Exxon's arguments concerning the bona fides of its business conduct were resolved in its favor by the trial court in determining that the imposition of civil penalties in this case would be inappropriate, and such findings were before the court in making its order of restitution. In arriving at its decision on penalties, the court pointed out that this did not excuse Exxon's behavior:

> "Exxon pushed the agency at every turn and probed each nuance in the regulations to interpret them to Exxon's advantage, sometimes ignoring their unequivocal dictates." 561 F.Supp. at 858.

Exxon's reference to "confusing regulations" and agency indecision, is simply a recasting of its unsuccessful claim in the trial court that the Government was estopped from challenging the legality of lease-by-lease accounting. The argument made here on "equitable grounds" is no more persuasive, and we adopt the find-

ings of the trial court on that issue, as set out at 561 F.Supp. 845-848.[41]

Finally, Exxon again raises the issues of prejudgment interest by asserting that it is inappropriate "where a party's actions were not 'willful'," and were not intentionally wrong. For the reasons heretofore discussed, such argument is without merit.

X.

The Remedy

Having determined the nature and extent of Exxon's liability, the district court was required to fashion an appropriate remedy in restitution commensurate with the extent of that liability. In so doing, the court first determined that, because of the nature of the Entitlements Program, and the price control regulations, the effect of Exxon's wrong had been spread throughout the distribution chain, to the ultimate consumers, so that it was impossible to trace the overcharges to specific victims, or to calculate precise damages sustained by such persons. Under these circumstances, the district court concluded that the overcharges should be distributed to those victims by channeling the funds received in restitution through the states, for the purpose of funding energy programs designed to benefit all citizens. In so doing, the Court used as guidance certain principles adopted by

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[41]The estoppel claim, to which the trial court devoted so much attention, was not raised as a separate issue on this appeal. The Government pointed out that this defense "has been dropped." U.S. Brief, p. 4, f.n. 1.

In its inimical style, Exxon has responded that "... (c)ontrary to the DOE's assertion, Exxon has neither 'dropped' its estoppel defense nor failed to press its statute of limitations defense.... As Exxon previously explained, in the event of a reversal and remand because of the improper resolution of factual issues, Exxon intends to assert the legal arguments to which such contested facts relate."

Congress in the Warner Amendment, Section 155, Pub. L. No. 97-377, 96 Stat. 1830 (1982), directing the disbursement of unclaimed petroleum violation escrow funds:

> "... Section 155 clearly bespeaks the intent of Congress that violators of the petroleum price regulations should be made to disgorge their illgotten gains even in situations, like the case before the court, where the victims of the petroleum overcharges cannot be identified. The colossal scale of Exxon's wrongdoing, and the workings of pervasive regulations to spread the burden of that wrongdoing impossibly far and wide, must not deter this court from fashioning an appropriate equitable remedy. The purpose of the domestic petroleum price regulations was to keep oil prices down, to relieve consumers of some of the burden of towering oil costs. The five energy conservation programs identified in Section 155 operate across the nation to reduce that same burden, either by reducing overall consumption through conservation or by direct financial assistance to those most in need. Although one might speculate as to alternative remedies, this court respects the wisdom of the solution chosen by Congress and shall adopt it as the most appropriate equitable remedy in the circumstances of this case." (561 F.Supp. at 857)[42]

In this appeal, Exxon contends that the award to uninjured state governments is not "restitution," that such award improperly exposes Exxon to multiple liabil-

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[42]The five energy programs to benefit from restitution of funds paid over to the states include weatherization of buildings, implementation of state energy conservation programs, reduction of energy consumption in schools and hospitals, promotion of conservation by small businesses and individuals, and assisting the poor with home utility bills. See opinion of the District Court, 561 F.Supp. at 856, f.n. 58.

ity, and that the district court assessed liability upon erroneous assumptions concerning the workings of the Entitlements Program, and Exxon's "unproved refiner allocation violations," without granting Exxon any discovery or opportunity to defend charges of refiner violations. The point to these challenges of the remedy adopted by the trial court appears to be that Exxon considers that it should retain or have a share in the overcharge funds because it was a first purchaser" of production from the field, or because it, as a refiner, was a participant in the Entitlements Program, or because it would be appropriate to leave the overcharges in Exxon's hands because it is impossible to identify the ultimate victims.

A. Primary Jurisdiction.

Some suggestion has been made that since the Department of Energy has significant expertise in assessing the implications and impact of its various regulations upon the petroleum industry, the question of ascertaining the victims of the overcharges in this case should be first referred to the agency for determination under the doctrine of primary jurisdiction. *United States v. Western P. R. Co.*, 352 U.S. 59, 1 L.Ed.2d 126 (1956), and see *In re Dept. of Energy Stripper Well Exemption Lit.*, 578 F.Supp. 586, 595-596 (D. Kan. 1983).[43]

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[43]The agency has set up special procedures for distribution of refunds recovered through Remedial Orders and Consent Orders processed through its administrative procedures. These procedures, sometimes referred to as "Subpart V proceedings," are instituted by petition in the Office of Hearings and Appeals. The OHA may decline to consider applications for refunds that are "too small to warrant individual consideration," in view of "direct administrative costs" that may be involved. 10 C.F.R. Sections 205.280 et seq.

In the *Stripper Well Litigation*, which was referred to the OHA in September, 1983, no final report has been made by the agency.

It should be remembered that this appeal involves an action for restitution, brought by the agency under the provisions of Section 209 of the Act — it does not involve proceedings to enforce a Remedial Order issued by the agency through administrative proceedings. When an agency chooses to file suit and is the plaintiff before the Court, the doctrine of primary jurisdiction does not apply. It has been pointed out that "deference to an agency's primary jurisdiction makes little sense in the context of an enforcement proceeding initiated by the agency." *United States v. Alcon Laboratories,* 636 F.2d 876, 888 (1 Cir. 1981), *cert. den.* 451 U.S. 1017.

The litigation began as an administrative proceeding, "and might have continued in that forum had the defendant not filed an action for declaratory relief" in Texas. *United States v. Exxon Corp., supra,* 470 F.Supp. 674. Instead the DOE withdrew its Notice of Probable Violation and began this action under Section 209. We previously ruled that the Department had dual enforcement authority, and that it need not exhaust its administrative authority before proceeding directly in court to enforce its remedy for restitution. *Exxon Corp. v. United States, supra,* 616 F.2d 526.

While a referral to the OHA might be appropriately ordered by a trial court in the exercise of its discretion under some circumstances,[44] we do not find that the Exxon litigation should be referred as a matter of law under any doctrine of primary jurisdiction. In our view, administrative proceedings would be "unnecessary, unnecessarily expensive, and likely to have a pre-ordained

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[44]We understand that in the *Stripper-Well* Multi-District litigation a number of cases involved Remedial Orders requiring modification or further administrative adjustment. The DOE there took the position that it would be appropriate to have all of the cases remanded for the purpose of tracing overcharges. The District Court retained jurisdiction, specifically noting that it, and *not* the DOE would decide where the funds go. 578 F.Supp. at 596.

outcome," fostering further needless delay. *United States v. Elrod,* 627 F.2d 813, 818 (7 Cir. 1980).

B. **Intervenors.**

The appellant intervenors, described above, have presented competing claims as to why each should receive a share of the refunds because of the manner in which each bore the burden of the overcharges.

The refiner intervenors claim that any burden was automatically shifted from first purchaser-refiners to all of the over 200 participants in the Entitlements Program by 10 C.F.R. Section 211.67. They claim the overcharges should be distributed among all refiners. The jobbers and independent gasoline dealers claim that the refiners passed through overcharges to them, and they are entitled to share in the refund. Certain groups of consumers, such as the airline industry, utilities, freight lines and motor vehicle owners claim that they bore the burden of the overcharges, and they suggest a remedy whereby such groups can be individually compensated by shares in the refund.

These intervenors complain that they were not allowed to appear as parties to present evidence on their various claims for refund, and so they were wrongfully denied their "day in court". Only two groups, the Indicated Refiners and the Gasoline Retailers sought to intervene prior to the decision of the trial court.[45]

After judgment was entered in the trial court, we filed our opinion in *Cities Service Co. v. Department of Energy, supra,* 715 F.2d 572, determining that Cities Service has

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[45]In December, 1982 and February, 1983 at the request of DOE and Exxon, the trial court stayed the requests to intervene pending resolution of the liability issue. Following entry of the Memorandum decision, intervention was granted solely for the purpose of arguing on appeal the question of distribution of the refund.

no right to intervene in a DOE enforcement action against Pennzoil for violation of price controls on crude oil. At issue was a DOE counterclaim against Pennzoil, filed under Section 209 of the ESA, which was settled by Pennzoil's agreement to pay $14,750,000 to the United States Treasury. In so doing, we discussed the significant difference between Section 209 and Cities' private right of action under Section 210 of the Act:

> "While sections 209 and 210 have a common purpose — the enforcement of DOE's regulations — they vindicate different rights. 'Actions by the United States under ESA Section 209 are taken to enforce public, not private, rights.' *Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717, 722.... By contrast, the action authorized by section 210 'is intended to be brought by private persons against other private persons.'.... We have previously warned against '(t)he commingling of private and agency enforcement devices for which Congress has made separate provisions....' *Dyke v. Gulf Oil Corp.* 601 F.2d 557, 567 ... The outsome of the instant case, an agency enforcement action brought by DOE, will in no way affect Cities' private right to sue Pennzoil directly for damages ... Under these circumstances, the district court correctly concluded that Cities has no interest that would be impaired by disposition of this action." (715 F.2d at 573-574)

Exxon attempts to distinguish *Cities Service* upon the ground that the overcharging firm (Pennzoil) had "voluntarily" entered into a consent order with the DOE, thereby taking the risk that it might also have to pay damages to third parties under Section 210 of the Act.

Exxon's claim of possible exposure to "double liability" is without persuasion. Any private action under Section 210 would be governed by state statutes of limitations.

See *Gulf Oil Corp. v. Dyke, supra,* 734 F.2d 797, 808, and *City of Long Beach v. D.O.E., supra,* ____F.2d ____. Exxon claimed that the two year statute of limitations for the State of Texas would apply to any private action under Section 210.

In any event, any Section 210 liability award against Exxon can be adjusted, if necessary, to take into account the restitution award here. See *Bulzan v. Atlantic Richfield Co.,* 620 F.2d 278, 283-284 (TECA 1980), and see *Dyke v. Gulf Oil Corp., supra,* 601 F.2d at 566 (1979).[46]

We adhere to our prior rulings in *Dyke* and *Cities Service* to the effect that public and private rights of action are separate and distinct, and not to be mingled in one proceeding. To do otherwise would hopelessly disrupt orderly proceedings in this type of action, and, as pointed out in *Dyke,* "the timing and scope of enforcement would become subject to the vagaries of private litigation. . . . Any wholesale commingling of discrete administrative and judicial responsibilities in public and private actions likely would hinder, disrupt, and render torpid the statutory scheme for expedited enforcement." 601 F.2d at 567.

Consumer Intervenors, presently without standing to institute private actions against Exxon under Section 210, agree that the overcharges were "passed down" to end consumers. They urge that a separate escrow fund be set up for their benefit before distribution to the states, or, alternatively, they suggest that the ascertainment of

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[46]Consumers Power and Hudson Refining Company voluntarily dismissed their appeals as Intervenor appellants in this case, and filed a class action suit in the District of Indiana under Section 210(a) of the ESA on behalf of all domestic refiners of crude oil that participated in the "Old Oil Entitlements Program," excluding sixteen large refiners that produced in excess of 100,000 barrels per day of crude oil, etc., *Consumers Power Company, et al. v. Exxon Corporation,* No. H83-0610, N.D. Indiana, filed 10/3/83. It is claimed that Exxon overcharges were borne by plaintiffs to the injury of a class numbering 300, in an amount exceeding $240 million.

the victims of the overcharges be referred to the OHA, as discussed previously.[47] While such procedure would be one method of distributing the overcharges, it is not the only method. For the reasons hereinafter discussed, we determine that the course chosen by the trial court was appropriate under all of the circumstances here.[48]

C. The Consumer as Ultimate Victim.

In its attack upon the remedy devised below, Exxon (and some Intervenor appellants) take the position that the trial court was required to trace, or attempt to trace, the overcharges from first purchaser, to refiner, through various monthly accountings required by the Entitlements Program, and its "banking" system, and then to determine the nature and extent of any passthrough of increased costs through the distribution system, such as might be authorized by 10 CFR Sections 212.83(c)-(d) (refiners) and 212.93(a) (resellers and retailers). It is appellants' position that such inquiry is required by our decision in *Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717 (TECA 1982) *cert. den.*, 459 U.S. 877 (1982).

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[47]RJB Cab, Inc., and Geraldine Sweeney, Intervenor-Appellants here, representing consumer interests, have filed a class action in the Eastern District of Pennsylvania, for declaratory judgment finding distributions under the "Warner Amendment" unconstitutional, and without effect. This action concerns administrative Consent Orders and settlement agreements entered into by the DOE in lieu of judicial actions brought under Section 209 of the ESA where settlement proceeds were paid into an escrow fund, then distributed in part to the states under the Warner Amendment. *RJG Cab, Inc., et al. v. Donald Hodel, et al.*, No. 83-3265, Eastern District of Pennsylvania, 1983.

The Pennsylvania action does not, of course, involve a judicial exercise of discretion by a court ordering restitution under Section 209.

[48]The Court appreciates the efforts of counsel for all Intervenor appellants, as well as that of counsel for the Intervenor appellee states. All briefs and arguments were most helpful to the court in reaching its decision.

In *Citronelle,* the Government sought restitution under the provisions of Section 209 for overcharges involved in four sales of domestic crude oil which had been improperly treated as export oil, exempt from price regulation. The District Court, finding that it could not "envision a formula which could make a meaningful distribution to the millions of consumers from Florida to Massachusetts who purchased power or goods . . .", ordered that restitution should be made to the United States Treasury. *Citronelle-Mobile Gathering, Inc. v. O'Leary,* 499 F.Supp. 871, 886 (S.D. Ala. 1980).

On appeal we fully recognized the broad equitable powers of the District Court in fashioning equitable remedies, but found that the order requiring payment of the overcharges to the United States Treasury was improper because it was not in accordance with the Section 209 objective of making victims whole, insofar as possible. The case was remanded for the purpose of fashioning some plan for disbursement of restitution funds, in accordance with the requirement that the Government must at least try to ascertain those persons who had been overcharged. *Citronelle,* 669 F.2d at 723.[49]

In our view, the District Court's judgment and order in this action are fully in accord with our ruling in *Citronelle,* where we specifically noted that:

> "The District Court, sitting as a Court of Equity, unless otherwise provided by statutes here in contemplation, had 'all the inherent equitable powers of the District Court . . . available for the proper and complete exercise of that jurisdiction'; . . . and has the power, 'to do equity and mould each decree to the necessities of the particular case'; further, 'It may act so as to adjust and reconcile competing claims . . . so

[49]To date, no plan has been devised by the District Court in *Citronelle.*

> as to accord full justice to all the real parties in interest . . . .' The authority inherent in the equity powers guarantees complete rather than truncated justice." 669 F.2d at 722. (Citations omitted.)

Here, the District Court appropriately determined that any attempt to trace the overcharges would be doomed to failure because of the pervasive influence of the Entitlements Program and other regulations which had the effect of passing on and diffusing the HFU overcharges through the distribution system. As pointed out by the trial court, this was a factor not present in the *Citronelle* litigation.[50] We have previously reviewed the consequences of the Entitlements Program. In *Union Oil Co. of Cal. v. U. S. Dept. of Energy,* 688 F.2d 797, 802 (TECA 1982), *cert. den.* 459 U.S. 1202 (1983), we noted that:

> "Certifications of price-controlled crude oil as exempt crude oil . . . reduced the total amount of crude oil production subject to price controls each month and therefore increased the total cost of the available crude oil supply. As a result, the benefits of price-controlled crude oil which were distributed among all refiners by the Entitlements Program were reduced. Thus, to the extent that crude oil producers sold otherwise price-controlled crude oil as uncontrolled crude oil . . . the higher cost of such uncontrolled crude oil was distributed among all domestic refiners through the operation of the Entitlements Program.

Once the overcharges were disbursed throughout the refining industry, the regulatory system was designed to insure that money spent or received by the refiners as the result of their purchases or sales of entitlements would be passed along to the ultimate consumers. Thus, all refiners

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[50]There were only four shipments of oil in *Citronelle.* All occurred prior to implementation of the Entitlements Program.

were permitted to pass through increased costs to their customers. 10 C.F.R. Section 212.83. 561 F.Supp. at 853. The EPAA specifically provided for "a dollar-for-dollar passthrough of net increases in the cost of crude oil . . . at all levels of distribution from the producer through the retail level." 15 U.S.C. Section 753(b)(2)(A). The refiners were also permitted to "bank" costs which were not passed through in the sales of products for one month, and to include these banked costs in calculating prices for later months. Calculation of these "banked costs" was subject to variable and complex formulas. 10 C.F.R. Section 212.83(e).

Additional regulations permitted the resellers and retailers, in turn, to pass on their increased costs to the ultimate consumer. 10 C.F.R. Sections 212.91 et seq.

This Court long ago recognized that the Entitlements Program was intended to "spread the benefit of access to old price-controlled oil and the burden of dependence on uncontrolled oil among all sectors of the petroleum industry, all regions of the country, *and among all consumers of petroleum products. . . .*" *Cities Service Co. v. F.E.A.*, 529 F.2d 1016, 1021 (TECA 1975), *cert. denied*, 426 U.S. 947 (1976). (Emphasis supplied).

We agree with the trial court's conclusion that any attempt to trace increased costs attributable to the HFU overcharges would require a full scale audit of the entire petroleum industry, and that any effort to do so would be futile. As the Government suggests, the first step in any such audit would require recalculating over seventy monthly entitlement lists issued during the period of the overcharges, taking into account such variables as the volumes of new and old oil produced during each month, the average acquisition costs, and the values of each entitlement. In determining the precise impact of the overcharges on any particular refiner, it would then be

necessary to consider the impact of exception relief which may have been granted by the agency over the term of the Entitlements Program. The difficulty of any such accounting is particularly clear in view of the fact that the DOE has not yet completed or issued a final January 1981 "Entitlements List," designed to settle accounts between the refiners following expiration of price controls. 10 C.F.R. Section 211.69 (1983). See *Navajo Refining Company v. United States Department of Energy*, No. 83-1492-M, D.C. New Mexico, Memorandum and Order of March 30, 1984.[51] See also, *Consumers Power Company v. Department of Energy*, 742 F.2d 1468 (TECA 1984) where we recently determined a right to participate in the Entitlements Program.

Even if the HFU overcharges could be traced to individual refiners, it would then be necessary to trace their effect on product resellers, retailers and consumers, through the provisions of passthrough regulations. That this task would be futile is illustrated by the difficulty of applying only one aspect of the regulations, that is, the calculation of "banked costs." Exxon itself admitted that it was unable to supply information on its own costs because:

> ". . . adjustments to the cost bank figures cannot be made until all outstanding questions concerning the proper interpretation of the Mandatory Petroleum

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[51] In *Navajo Refining*, more than three years after Navajo had paid $4 million into the program, Navajo had not received any restitution to which the DOE had determined it was entitled. The FERC had denied reimbursement, "stating only that it was 'sure' DOE would implement relief to Navajo 'consistent with its responsibilities to wind up the Entitlements Program." p. 6, Slip Op.

After publication of the list, the DOE contemplates a series of "Post-clean-up claims and obligations" procedures whereby the OHA, the FERC, or a court may determine final claims payable under the Entitlements Program. 10 C.F.R. Section 211.69(h).

> Price regulations have been resolved. As a result, a final determination of the actual cost bank figures can only be made after all pending administrative and court proceedings have been concluded.
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> * * *
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> Because this question involves the basic fabric of the entire passthrough program and could involve millions of documents in possession of Exxon, the DOE and other companies, it cannot be answered with specificity." (Answer to Plaintiff's Interrog. 11(b), 19(e), R. 1592, 1602).

The fact that banked costs might exist as to any particular refiner does not mean of course that increased costs were not passed on through the distribution system. To determine this would require an investigation into the state of mind of each refiner in setting prices for individual petroleum products each month. Such a task would be impossible, and several of the intervenors have so conceded. See Gladieux Brief, p. 9, "No such finding could possibly be made without an extremely time-consuming factual inquiry, one which is almost certainly beyond the capacity of any court or administrative agency;" Marathon Brief, p. 17, "(P)roving passthrough or overcharges would depend entirely on uncertain economic assumptions and impossibly complex measurements."

The refiners' suggestion that refunds be made payable to themselves as "first purchasers" would result in inequities, inconsistent with the fundamental purpose of restitution under Section 209. As the trial court pointed out, prior to decontrol, if a court ordered restitution to first purchaser, then that refund would eventually be passed along the distribution line to an ultimate consumer of petroleum products. However, in view of the 1981 decontrol of oil prices, "there has existed no ready method of ensuring that overcharges will be refunded to their ulti-

mate victims, the consumer." Under the situation here, the Court found that "(t)o order a refund to the first purchaser would simply result in a windfall gain for that purchaser — ironically, in this case, Exxon itself — who would be under no obligation to pass the refund along." 561 F.Supp. at 854.[52]

There was no need for the District Court in this action to attempt the impossible task of attempting to ascertain the damage sustained by individual consumers of petroleum products. In this respect, it should be noted that this action for restitution under Section 209 differs in significant degree from a private action of damages under Section 210. As noted in *Citronelle-Mobile, supra,* 669 F.2d 717 at 722:

> "The central purpose of restitution is to determine the amount by which the wrongdoer has been unjustly enriched and then to make him disgorge that amount. *No proof is required that the plaintiff was damaged, must less the amount of any damage."* (Emphasis supplied).

The form of relief chosen by the trial court in this action by which the restitution funds will be channeled through the states for use in the enumerated energy programs designed to benefit the consuming public bears a reasonable relationship to the injury sustained by the consumer public as a consequence of Exxon's violation of federal energy pricing regulations. The judgment in this action requires Exxon to pay the overcharges and interest into an interest bearing Treasury escrow account, to be

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[52]In *DOE, et al. v. Ray L. Hunt, et al.,* No. 5-101, 5-102, an appeal pending before this court, a Remedial Order of 1977 required a refund to be made to the first purchaser. Due to decontrol and "changed circumstances," the DOE sought a partial remand of the Remedial Order in order to determine whether this refund provision should be modified. The DOE appeals an order requiring payment to the first purchaser.

held in trust by the Treasury. Following the conclusion of all appeals in this case, the Fiscal Assistant Secretary of the Treasury is required to disburse the money, with additional accrued interest to the states, with instructions as to use of the funds which are consistent with the trial court's Memorandum. The judgment further orders that the states and other jurisdictions "shall use all funds so disbursed in a manner consistent with" the trial court's order. The states will be required to report annually to the Court and to the DOE the manner in which the funds have been used, until all have been expended.

We believe this form of disbursement to be equitable, and fair, and a reasonable method of compensating the consuming public for the HFU overcharges. It accomplishes the intent of Congress that violators of the price regulations be required to disgorge their gains, even in situations where it may not be possible to identify and compensate each individual victim. While other remedies might have been adopted by the trial court,[53] the remedy chosen avoids further administrative delay and confusion, with additional costs, it prevents the frustration of congressional objectives in securing prompt enforcement of what has been denominated as "emergency" price regulations, and it is a reasonable means to protect the public interest.

The District Court unquestionably possessed broad equitable powers to remedy the wrong caused through Exxon's violation of price regulations at the Hawkins Field Unit. Under all of the circumstances presented in

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[53]In *United States v. Robert B. Sutton, et al.*, No. 82-C-1069-B, (N.D. Okla.) involving a claim for restitution under Section 209 of the ESA, the District Court directed payment be made to the states for use in certain energy programs described in the Warner Amendment. *Sutton* is now pending on appeal in this Court.

the record, we conclude that the trial court did not abuse that discretion in fashioning its remedy.

The Judgment of the District Court is AFFIRMED in all respects.

WILLIAM H. BECKER, Judge, Concurring in Part, and Dissenting in Part.

CONCURRENCE IN PART

First, I wish to concur in the affirmance of the excellent opinion and judgment of the able District Judge on those difficult and complex issues, finding and concluding that Exxon Corporation was liable for overcharges and interest for violation of the applicable statutes and regulations fixing the maximum prices for the crude oil in question. On these issues, which include nearly all the major issues presented in these appeals, the District Judge found the facts and applied the applicable law in an unusually clear, discriminating and exemplary manner. See *United States v. Exxon Corporation* (D.D.C. 1983), 561 F.Supp. 816, for the findings of fact and conclusions of law of the District court incorporated in the judgment from which these appeals are taken. (Some supplementary undisputed facts in the Record in the District Court are cited in the dissenting opinion which follows.)

DISSENT IN PART

SCOPE OF DISSENT

The portion of the majority opinion in this Court, from which I dissent, is included in the part entitled "X. The Remedy." The majority opinion in this part concludes that the District Court exercised a *legal discretion* in ordering the funds representing illegal overcharges in the principal sum of $1,635,604,638.10 and interest to be paid by the Exxon Corporation to the United States Treasury

to be held in trust for disbursement to the States for use in one or more of five energy conservation programs listed in the "Warner Amendment," § 155 of P. L. 97-377, 96 Stat. 1830, 1919 (1982). Whether this disposition might have been within the discretion of the District Court, if the District Court in an efficient judicial manner had satisfied all legally established claims in restitution of victims of the overcharges is not a subject of this dissent. It may be that on a fuller record payments on doctrines of fluid recovery, *cy pres* or *parens patriae* or other applicable doctrines should be made to groups representing all the public or other indentifiable groups of victims.

This disposition of the overcharges and interest was finally adjudged by the District Court, without any judicial or administrative attempt by notice and hearing, to identify the victims of the illegal overcharges or the amounts of the damages suffered by each victim or groups of victims. In fact, many parties claiming in good faith to be victims of the illegal overcharges were denied notice and an opportunity to be heard on their claims, or to intervene for these purposes.

In my opinion, this summary denial of a hearing on the claims in good faith of the alleged victims, violated established historical equitable principles of restitution and of procedural Due Process guaranteed by the Fifth Amendment to the Constitution of the United States.

The historical equitable and constitutional principles, in my opinion, cannot be lawfully ignored in the discretion of a court, as explained hereinafter.

I

Judicial Duty And Power to Order Restitution

Under the controlling decisions of the Supreme Court of the United States, this Court and the Circuit Courts of

Appeals, this dissenting opinion concludes, among other things, that the federal courts have the inherent historic equitable and constitutional duty and power to order restitution to parties damaged by violations of valid statutes or regulations, or both, fixing prices, allocations and incidental rights and duties (as in the Entitlements Program).[1]

Therefore the inherent judicial duty and power to order such restitution exist (a) in civil actions, under § 209 of the Economic Stabilization Act, to enforce such valid statutes or regulations, or both, and (b) also in equitable civil actions in which the violations were temporarily protected by injunctions, wrongfully issued. This judicial duty and power is authorized by general law and was expressly confirmed by Congress in the last sentence of § 209 of the Economic Stabilization Act (ESA). 12 U.S.C. 1904 note; 1971 U.S. Code, Congressional and Administrative News (USCCAN) 2291 reporting the legislative history of the ESA.[2] As stated by the Supreme Court of the United States in *Porter v. Warner Holding Company*, 328 U.S. 395, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946), the

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[1]Such inherent judicial duty and power to order restitution in civil actions exists whether the violations were, or were not, temporarily protected by an improperly issued injunction, later vacated by the issuing court or by an appellate court.

[2]The fact of recognition and endorsement rather than creation, by Congress, of the power and duty to order restitution in § 209 is established by the relevant portion of the legislative history of § 209 reported in 1971 USCCAN at page 2291 where it is stated:

> "In addition to injunctive relief, the court may also order restitution of moneys received in violation of any regulation or order. It was not certain that, in these circumstances, there was an inherent equitable power in the court to set things right and order restitution. Restitution has been granted in several cases successfully prosecuted by the Government in Phases I (*United States v. Lieb*, Civil Action No. SA 71 CA 267, D. C., W.D. Tex., Oct 13, 1971). This provision makes clear that the court has power to grant restitution."

judicial duty and power to order such restitution are broader and more flexible when the statutes or regulations in issue, or both, primarily serve the public, rather than a private interest, as in the EPAA, the EPCA and regulations thereunder, which primarily serve the public interest.

Selected controlling decisions of the Supreme Court of the United States defining and enforcing the judicial duty and power to order such restitution are cited and summarized hereinafter.

A.

Selected Controlling Decisions Of Supreme Court Of The United States On Duty And Power to Order Restitution

In *Porter v. Warner Holding Company* (*Warner Holding*), *supra*, 328 U.S. 395, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946), the duty and power of a federal court under the Emergency Price Control Act of 1942 (Act), 50 U.S.C. § 925(a), to order restitution of rents collected in excess of legally permissible ceiling rates were defined and enforced by the Supreme Court. In that case, the District Court had enjoined the defendant landlord from collecting excess rents, but declined to order restitution, holding there was no jurisdiction to do so under the Act. The Eighth Circuit Court of Appeals affirmed the judgment of the District Court.

The Supreme Court reversed the judgment of the District Court finding that the Administrator of the Office of Price Administration had invoked the equitable jurisdiction of the District Court by seeking an injunction to enforce the rent ceiling. The Supreme Court then held that the District Court had the broad inherent equitable duty and power to do what justice required, stating:

"Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. *And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.* Virginian R. Co. v. System Federation, R. E. D. 300 U.S. 515, 552, 81 L.Ed. 789, 802, 57 S.Ct. 592. Power is thereby resident in the District Court, in exercising this jurisdiction, 'to do equity and mould each decree to the necessities of the particular case.' Hecht Co. v. Bowles, 321 U.S. 321, 329, 88 L.Ed. 754, 760 64 S.Ct. 587. It may act so as to adjust and reconcile competing claims and so as to accord full justice to all the real parties in interest; if necessary, persons not originally connected with the litigation may be brought before the court so that their rights in the subject matter may be determined and enforced. In addition, the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice. Camp v. Boyd, 229 U.S. 530, 551, 552, 57 L.Ed. 1317, 1326, 1327, 33 S.Ct. 785. (Emphasis added.)

"Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.'

> Brown v. Swann, 10 Pet. (US) 497, 503, 9 L.Ed. 508, 511. See also Hecht Co. v. Bowles, supra, (321 U.S. 330, 88 L.Ed. 761, 64 S.Ct. 587)." *Warner Holding*, 328 U.S. at 398, 66 S.Ct. at 1089, 90 L.Ed. at 1336, 1337.

In *Public Service Commission of Missouri v. Brashear Freight Lines (Brashear Freight)*, 312 U.S. 621, 61 S.Ct. 784, 85 L.Ed. 1083 (1941), many common carriers secured in a District Court an invalid injunction against enforcement of a valid regulatory statute of Missouri imposing taxes and license fees on motor carriers operating in interstate commerce. The Supreme Court held that the District Court had the duty and power to assess damages including costs of litigation, taxes and fees, caused by the improperly granted injunction, under which the challenged taxes and license fees had been deposited in escrow, stating:

> "Under long settled equity practice, courts of chancery have discretionary power to assess damages sustained by parties who have been injured because of an injunctive restraint ultimately determined to have been improperly granted. Russell v. Farley, 105 U.S. 433, 44 et seq., 26 L ed . 1060, 1064; Pease v. Rathbun-Jones Engineering Co., 243 US 273, 279, 61 L ed 715, 721, 37 S Ct 283, Ann Cas 1918C 1147." *Brashear Freight*, 312 U.S. at 629, 61 S.Ct. at 788, 85 L.Ed. at 1088.

In *Brashear Freight, supra*, the Eighth Circuit Court of Appeals had failed to recognize and enforce the duty and power of the District Court to make restitution, despite the deposit in escrow or trust of the challenged taxes and license fees under the protection of the improperly issued injunction against enforcement of the regulatory statute of Missouri.

In 1960, the Supreme Court of the United States in *Mitchell v. De Mario Jewelry (De Mario Jewelry)*, 361 U.S. 288, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960), expressly affirmed *Warner Holding, supra,* 328 U.S. 395, 66 S.CT. 1086, 90 L.Ed. 1332 (1946). In *De Mario Jewelry, supra,* the Supreme Court quoted the language of *Warner Holding, supra,* stating that a court in equity may give whatever relief is necessary, and then stated:

> "The applicability of this principle is not to be denied, either because the Court there [*Porter v. Warner Holding Co.*] considered a wartime statute, or because having set forth the governing inquiry, it went on to find in the language of the statute affirmative confirmation of the power to order reimbursement. Id. 328 US at 399. When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, *it must be taken to have acted cognizant of the historic power of equity to provide complete relief* in light of the statutory purposes." *De Mario Jewelry,* 361 U.S. at 291, 292, 80 S.Ct. at 335, 4 L.Ed.2d at 326 (emphasis added).

In *United States v. Morgan (Morgan II)*, 307 U.S. 183, 59 S.Ct. 795, 83 L.Ed. 1211 (1939), the Supreme Court of the United States ruled on the disposition of a fund paid into the court pending the outcome of a suit to set aside an order by the Secretary of Agriculture under the Packers and Stockyards Act of 1921, 7 USCA §§ 181-229. The challenged order reduced scheduled rates at the Kansas City stockyards. The fund was the difference between the old, high rate and the new, low rate ordered by the Secretary of Agriculture. [In 1938, in an earlier case, the new low rate had been set aside by the Supreme Court. *Morgan v. United States (Morgan I)*, 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129 (1938).]

In 1939 in *Morgan II, supra,* the Supreme Court stated that:

> "Decision turns on the meaning and application of the provisions of the Packers and Stockyards Act, construed in the light of its dominant purpose to secure to patrons of the stockyards prescribed stockyard services at just and reasonable rates, and upon the *authority and duty of the district court* to effectuate that purpose in making disposition of the fund." *United States v. Morgan,* 307 U.S. at 188, 189, 59 S.Ct. at 798, 799, 83 L.Ed. at 1216 (emphasis added).

In 1939 in *Morgan II, supra,* the Supreme Court discussed further the authority and duty of the District Court, stating:

> *"The district court,* in staying the Secretary's order and at the same time arresting the excess payments to appellees under the scheduled rates, *assumed the duty of making the proper disposition of the fund upon the termination of the litigation.* The duty was the more imperative here because the court's injunction order not only deprived the public of the benefit of the lower rates but obstructed any effective reparation order by the Secretary. Its action presupposed that the ownership of the excess payments was in doubt and could be finally determined only by an adjudication on the merits of the reasonableness of the filed rates. *In taking the payments into custody it acted as a court of equity, charged both with the responsibility of protecting the fund and of disposing of it according to law,* and free in the discharge of that duty to use broad discretion in the exercise of its powers in such manner as to avoid an unjust or unlawful result. It entered into no contract or understanding with the litigants; it entered into no undertaking as to the manner of disposing of the fund; its

duty with respect to it is that prescribed by the applicable principles of law and equity for the protection of the litigants and the public, whose interests the injunction and the final disposition of the fund affect. Inland Steel Co. v. United States, 306 U.S. 153, ante, 557, 59 S.Ct. 415, supra. (Emphasis added.)

"It is familiar doctrine that the extent to which a court of equity may grant or withhold its aid, and the manner of moulding its remedies, may be affected by the public interest involved." *United States v. Morgan*, 307 U.S. at 193, 194, 59 S.Ct. at 801, 83 L.Ed. at 1218, 1219.

Later, in *Federal Power Commission v. Interstate Natural Gas Company (Interstate Natural Gas)*, 336 U.S. 577, 69 S.Ct. 775, 93 L.Ed. 895 (1949), the Supreme Court of the United States ordered that the Court make restitution to the consumers rather than the first purchasers of natural gas of a fund accumulated in escrow pending review of a Federal Power Commission (FPC) order reducing rates for natural gas. The pipeline companies that were the direct purchasers claimed the fund, but petitioner and several state and municipal agencies claimed that the fund should be paid to the ultimate consumers. The Court of Appeals ordered payment to the pipeline companies on the authority of *Central States Electric Company v. Muscatine, (Central States)*, 324 U.S. 138, 65 S.Ct. 565, 89 L.Ed. 801 (1945). The Supreme Court distinguished *Central States, supra*, on the fact that in the *Interstate Natural Gas* case, under review, the pipeline companies were subject to the jurisdiction of the FPC and federal law; and found that the aim of the Natural Gas Act was "to protect ultimate consumers of natural gas from excessive charges" because "[t]hey were the intended beneficiaries of rate reductions ordered by

the federal commission. . . ." *Interstate Natural Gas, supra,* 336 U.S. at 581, 69 S.Ct. at 778, 93 L.Ed. at 901. In that case, the Supreme Court reasoned that reduced rates would have been passed through by the wholesaler "unless we are to assume that the passage of the Natural Gas Act was an exercise in futility." *Interstate Natural Gas,* 93 L.Ed. 895 at 901. In that case the Supreme Court further *held that the lower court must look beyond the first purchaser and seek the proper recipients of the fund* stating:

> "But apart from those exceptions [unreasonably low rates by pipeline companies or pass through of rate reductions], it is the duty of the court to look beyond those companies for the rightful claimants of the fund. It is the responsibility of the court which distributes the fund accumulated under its stay order "to correct that which has been wrongfully done by virtue of its process.' United States v. Morgan, 307 US 183, 197, 83 L.Ed 1211, 1220, 59 S.Ct. 795. *That responsibility plainly cannot be discharged by payment of the fund to those who show no loss by reason of the court's action.* (Emphasis added.)
>
> * * *
>
> "When a federal court of equity grants relief by way of injunction it has a responsibility to protect all the interests whom its injunction may affect. Inland Steel Co. v. United States, 306 US 153, 83 L.Ed 557, 59 S.Ct. 415. It assumes the duty to make disposition of the fund in accord with equitable principles. United States v. Morgan, supra, (307 US at 191, 83 L.Ed 1217, 59 S.Ct. 795). If in a particular case the court reaches the question of reasonableness of rates, it does so only for purposes of distributing the fund for whose creation it alone was responsible. It does not fix or prescribe rates for the past or the future. The reasonableness of rates charged by the compa-

nies who claim the fund is wholly ancillary to the problem of determining what claimants are equitably entitled to share in it.

* * *

"In conclusion, the task of the federal court in distributing the fund accumulated by virtue of its stay order is to undo the wrong which its process caused. The basic problem, therefore, is not to fix rates but to determine who suffered a loss as a result of the court's action in granting the stay. What in fact would have happened as a consequence of federal or state law if the stay had not been issued, no one can know for a certainty. But federal court must make its prognostication, whether an excursion into federal or state law questions is entailed. Distribution of the fund should not involve prolonged litigation. It is an administrative matter involving the exercise of an informed judgment by the federal court and should have the flexibility and dispatch which characterize the administrative process." *Interstate Natural Gas,* 336 U.S. at 582, 584, 69 S.Ct. at 778, 779, 93 L.Ed. at 901-903.

B.

Controlling Cases from this Court on the Judicial Duty and Power to Order Restitution

This Court, the Temporary Emergency Court of Appeals of the United States (TECA), has consistently followed the controlling decisions of the Supreme Court of the United States in ordering restitution in cases in which illegal charges were collected in violation of a statute or regulation, or both. *Citronelle-Mobile Gathering, Inc. v. Edwards,* (TECA 1982) 669 F.2d 717, cert. denied, 459 U.S. 877, 103 S.Ct. 172, 74 L.Ed.2d 141 (1982);

Sauder v. Department of Energy, (TECA 1981) 648 F.2d 1341; *United States of America v. Pro Football, Inc.,* (TECA 1975) 514 F.2d 1396; *DeRieux v. Five Smiths, Inc.,* (TECA 1974) 499 F.2d 1321, cert. denied, 419 U.S. 896, 95 S.Ct. 176, 42 L.Ed.2d 141 (1974); *University of Southern California v. Cost of Living Council,* (TECA 1972) 472 F.2d 1065, cert. denied, 410 U.S. 928, 93 S.Ct. 1364, 35 L.Ed.2d 590 (1973); *United States v. Lieb,* (TECA 1972) 462 F.2d 1161.[3]

Citronelle-Mobile Gathering, Inc. v. Edwards (Citronelle),[4] *supra,* (TECA 1982) 669 F.2d 717, *cert. denied,* 459 U.S. 877, 103 S.Ct. 172, 74 L.Ed.2d 141 (1982), was our last definitive opinion on the duty and power to order restitution of excess prices collected in violation of statutes and regulations governing the price of petroleum products. In that case, the Secretary of Energy on behalf of the United States asserted an enforcement counterclaim under § 209 of the ESA on behalf of domestic customers alleged to have been overcharged. The District Court granted a partial summary judgment for the United States (Secretary) on the counterclaim under § 209 holding that the appellants (Citronelle-Mobile Gathering, Inc., and others) collected excess prices in violation of the ESA and EPAA and regulations thereunder. This Court then ordered and authorized restitution of the illegal excess charges by deposit in a trust account in accordance with the then existing General Accounting Office Procedures, or under a plan for a "Deposit Fund Account" *or other appropriate procedures to be approved by the District Court* stating in part:

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[3]In an unappealed final judgment within the scope of the appellate jurisdiction of this Court, a District Court ordered restitution of unlawful excess charges for football tickets in violation of the Economic Stabilization Act (ESA) of 1970. *Oakland Raiders v. Office of Emergency Preparedness,* (N.D. Cal. 1974) 380 F.Supp. 187.

[4]See additional discussion of *Citronelle, supra,* in Part I C., below.

"RESTITUTION IS APPROPRIATE RELIEF

"Having agreed with the district court's determination that appellants have violated the provisions of the ESA, EPAA and the regulations promulgated thereunder which establish the ceiling price for the four sales of domestic crude oil, and the maximum lawful selling price for the resale of domestic crude oil, 6 C.F.R. part 150 and 10 C.F.R. part 212, this Court reviews the relief fashioned by the district court judge. The counterclaim seeks judgment requiring plaintiffs to pay into an escrow account, 'for subsequent distribution to NEPCO customers', the excess charges. Allegations place the sum between $6,000,000.00 and $9,000,000.00, exclusive of interest and civil penalties. No accurate calculations are before the Court at this time.

* * *

"An immediate confrontation with the method/process of enforcement emerges. Neither appellants, nor various *amici* attack restitution as being outside the scope of relief authorized, rather, they insist the decision ordering restitution to the United States Treasury is beyond the district court's authority. The Court finds on this issue no justification for allowing plaintiffs to retain their illegal gains.

"The district court, sitting as a Court of Equity, unless otherwise provided by statutes here in contemplation, had 'all the inherent equitable powers of the District Court . . . available for the proper and complete exercise of that jurisdiction'; *Porter, supra* 328 U.S. at 398, 66 S.Ct. at 1089, and has power, 'to do equity and mould each decree to the necessities of the particular case'; further, 'It may act so as to adjust and reconcile competing claims . . . so as to

accord full justice to all the real parties in interest . . . .' The authority inherent in the equity powers guarantees complete rather than truncated justice. *Camp v. Boyd,* 229 U.S. 530, 551, 33 S.Ct. 785, 793, 57 L.Ed. 1317 (1913). *The power of a district court to require restitution,* as was pronounced in *United States v. Lieb,* 333 F.Supp. 424 (W.D.Tex. 1971), *was specifically endorsed and ratified by Public Law 92-2105* (Footnote 5, *See* U.S. Code and Congressional News, 92d Congress, 1st Session (1971) pp. 2283, 2291.) (Sec. 209), but nothing has been pronounced as to payment to the United States Treasury. *Federal district courts unquestionably possess broad discretion in fashioning equitable remedies, Franks v. Bowman Transportation, Co.,* 424 U.S. 747, 764, 96 S.Ct. 1251, 1264, 47 L.Ed.2d 444 (1975) but, as contemplated in the exercise of these powers to remedy civil wrongs and restore civil rights, the authority is vested to make the victims whole, 'so far as possible, and restored to a position where they would have been had it not been for' the unlawful violation, such as was practiced here. It follows that payment to the United States Treasury is not restitution, in the true sense of the word, or in the objectives of the statutes here involved. (Emphasis added.)

"We face the brilliant rationale of the trial court in its envision of millions of customers along the east coast having been overcharged. Clear, however, is the fact that the sale of the over-priced oil was made to determinable utilities and other institutions along the Atlantic seaboard. Faced with a statute that specifically authorizes restitution, but makes no provision for direct payment to the treasury, we turn to *University of Southern California, supra,* which ordered refunds of excess charges for football tickets.

> 'While this Court recognizes the considerable burden that such a refund demand places . . . we recognize also the right of the agencies to require it.'

Id. at 1070.

We believe such a process to be a reasonable application of the power of the district court. This is obviously in the contemplation of defendant as evidenced by its request for relief. Actions by the United States under ESA § 209 are taken to enforce public, not private, rights. Thus, compensation is 'a by-product of the agency's effort to re-establish compliance with its regulatory scheme.' *Bulzan, supra,* at 282. The central purpose of restitution is to determine the amount by which the wrongdoer has been unjustly enriched, and then to make him disgorge that amount. No proof is required that the plaintiff was damaged, much less the amount of any damage:

> 'Restitution is generally awarded only in order to deprive the defendant of enrichment obtained at the plaintiff's expense . . . the general requirement does not mean that the gain to the defendant need be equated to the loss of the plaintiff, nor indeed that there need be any loss to the plaintiff except in the sense that a legally protected interest has been invaded.'

Restatement of Restitution, Sec. 1, Comment e (1937), cited in *Sauder v. Doe,* 648 F.2d 1341 (TECA 1981). The district court properly held that because NEPCO and PETCO aided and abetted the Chamberlain firms in their violation of the price regulations, for their material benefit, they are barred by 'unclean hands' from seeking or recovering any of the illegal profits.

"Apparently, however, restitution payments may be made to the Treasury under special order of the court. The Treasury holds the payments in a 'Deposit Fund Account' to be paid out at the direction of DOE. *See* General Account Office Procedures Manual, Title 7, Sec. 4.10(6). *Cf. Hodgson v. Wheaton Glass Co.*, 446 F.2d 527, 535 (3d Cir. 1971).[6]

(Footnote 6, *See also* 28 U.S.C. §§ 2041, 2042.)

Receipts contained in those accounts are subject to a 'constructive trust,' *Emery v. United States*, 186 F.2d 900, 902 (9th Cir. 1951); are treated as liabilities of the United States, *see e.g.*, Treasury Combined Statement of Receipts, Expenditures, and Balances of the United States Government, Fiscal Year 1978 at 3,12; and for their disbursement, an appropriation is not required. This affords an opportunity for DOE to pursue those proposals suggested by its requrest that the Court

> 'Enter a judgment requiring Gathering, Services and Chamberlain to pay into an escrow account for subsequent distribution to NEPCO customers, a sum of . . .'

As determined by the district court the Government has demonstrated injury to a class of persons. Whether the defendant will ask to amend under Rule 15, Federal Rules of Civil Procedure, institute interpleader under Rule 22 and related statutes, or proceed otherwise is not revealed in the record before this Court. Suffice it to note that the Government has a *duty* to try to ascertain those overcharged, and refund them, with interest, from the restitution funds.

"The Order of the district court is modified and the case remanded to that forum for an Order di-

recting the application to the General Accounting Office Procedures, and/or the furnishing of a plan for the 'Deposit Fund Account', and/or other appropriate procedures, to be approved by the district court.

"Meanwhile, within such time as the district court may direct, the parties will enter a stipulation, failing which, file appropriate motions in that forum." *Citronelle,* 669 F.2d at 721-723.

The only different circumstances in this case that did not exist in the *Citronelle* case, *supra,* are the "decontrol" of petroleum prices and allocations in 1981 and the many changes in the statutes and regulations, and in the structure, operations, personnel, remedial policies and administrative decisions which governed the Department of Energy and its predecessors prior to "decontrol" (or "deregulation") of the petroleum industry on January 28, 1981. The effect on restitution by judicial orders of these changed circumstances since "decontrol" are discussed hereinafter in reviewing the currently available remedies and procedures to accomplish judicial restitution.

The following additional decisions of this Court on the issues of restitution are substantially in agreement with the principles announced in the *Citronelle* case, *supra.* They are in inverse chronological order: *United States v. Pro Football, Inc.,* (TECA 1975) 514 F.2d 1396, an action under § 209 ordering restitution of excess charges for football tickets; *DeRieux v. Five Smiths, Inc.,* (TECA 1974) 499 F.2d 1321, cert. denied 419 U.S. 896, 95 S.Ct. 176, 42 L.Ed.2d 141 (1974), ordering restitution of excess charges for football tickets; *University of Southern California v. Cost of Living Council,* (TECA 1972) 472 F.2d 1065, cert. denied 410 U.S. 928, 93 S.Ct. 1364, 35 L.Ed.2d 590 (1973), ordering restitution of excess charges for football tickets; and *United States v. Lieb,* (TECA 1972)

462 F.2d 1161, ordering restitution of rents in excess of rent guidelines.

C.

TECA Opinions Relied on in the Majority Opinion in Part "X. The Remedy."

In the majority opinion in Part "X. The Remedy," the majority concludes that it was within the discretion of the District Court to enter summary judgment (a) denying intervention; (b) refusing to grant a hearing in restitution proceedings to those claiming to be injured by the illegal overcharges; (c) and assuming without a hearing that all illegal overcharges had been spread "through the distribution chain, to the ultimate consumers" and (d) that the overcharges should be paid to the Treasury in escrow to dispense the funds to the States, by analogy to P.L. 97-377, § 155 (the "Warner Amendment").

It is concluded in this dissent that the majority erred in concluding that the District Court in its Memorandum Opinion of March 25, 1983, 561 F.Supp. 816 had *discretion*, without notice and hearing, to enter a summary judgment in conflict with (a) controlling decisions of the Supreme Court of the United States on Due Process; (b) historic equitable principles; (c) the controlling opinions of this Court; and (d) the last sentence of § 209 of the Economic Stabilization Act, *supra*, discussed hereinabove. The discussion, cases cited, statute cited, and conclusions expressed in Parts II and III of this dissenting opinion on Due Process, equitable principles of restitution and intervention are incorporated at this point by reference. They will not be repeated in this Part I, except to the extent necessary in distinguishing the cases relied on by the majority in Part "X. The Remedy."

The following cases are relied on by the majority in Part "X. The Remedy": *Cities Service Co. v. Department of Energy,* (TECA 1983) 715 F.2d 572; *Dyke v. Gulf Oil Corporation,* (TECA 1979) 601 F.2d 577; *Bulzan v. Atlantic Richfield Co.,* (TECA 1980) 620 F.2d 278; *Citronelle-Mobile Gathering, Inc. v. Edwards,* (TECA 1982) 669 F.2d 717; *Cities Service Co. v. Federal Energy Administration,* (TECA 1975) 529 F.2d 1016.

In a supplemental letter[5], the author of the majority opinion cited these additional cases in support of the majority opinion on "The Remedy": *Payne 22, Inc. v. United States of America,* (TECA 1985) 762 F.2d 91; *Midwest Petroleum Co. v. DOE,* (TECA 1985) 760 F.2d 287.

None of these TECA cases, it is submitted, support the conclusions in the majority opinion or could serve as a precedent to hold that the District Court had *discretion* to render a summary judgment contrary to (a) Due Process guaranteed by the Constitution; (b) controlling decisions of the Supreme Court and of this Court on historic equitable principles; and (c) the last sentence of § 209 affirming historic controlling equitable principles on restitution.

The discussion of all the cases relied on by the majority follows.

Cities Service Company v. Department of Energy (Cities Service),
(TECA 1983) 715 F.2d 577

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[5]The two cases distinguished in this part are not in the original draft of the majority opinion but were cited by the author of the majority opinion in a letter submitted after circulation of the original draft. Because they may be added to the original draft, they are included in this part.

The *Cities Service* case, *supra,* rules only on the right of intervention and the facts in the *Cities Service* case, *supra,* were distinguished from this case in that:

(a) the counterclaim in the *Cities Service* case under § 209 was *settled* by an Agreed Final Judgment (715 F.2d at 573 and 574), that provided for payment of an agreed sum to the U.S. Treasury;

(b) the District Court found that Cities Service Company "*had no 'interest'* within the meaning of Fed.R.Civ.P. 24(a)(2)," in contrast to the finding in this case that the intervenors *had an interest* as defined by Rule 24(a)(2) (R. 31607); and

(c) the rule of the controlling TECA case of *Citronelle-Mobile Gathering, Inc. v. Edwards, supra,* 669 F.2d 717, cert. denied 459 U.S. 877, 103 S.Ct. 172, 74 L.Ed.2d 141 (1982), is recognized but distinguished because of the different facts stated above.

The *Cities Service* case, *supra,* is relied on by the majority to support the questionable conclusion that a party, entitled to a hearing on principles of Due Process, restitution and equitable principles of restitution in an action under § 209, has only a private action under § 210. But there is no case holding that any party that has rights under § 210 is not entitled to a hearing in restitution under § 209, under constitutional and equitable principles, principles of procedural Due Process, and the last sentence of § 209 when the illegal overcharges are in the control of the court.

No reconciliation of the ruling of the majority, remitting the victims of the illegal overcharges to separate civil suits under § 210[6] is made by the majority with the

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[6]The logical result of the finding of the majority that all members of the public were victims of the overcharges and that each victim is limited to relief in a private action for damage under § 210 is that there are hundreds of

controlling cases of the Supreme Court of the United States, in restitution, represented by *Public Service Commission of Missouri v. Brashear Freight Lines, supra*, 312 U.S. 621, 61 S.Ct. 784, 85 L.Ed. 1083, a restitution proceeding in which such a ruling such as that of the majority was reversed by the Supreme Court of the United States, which said:

> "There can be no question of that judge's right to deal with issues such as those here presented. Under long settled equity practice, courts of chancery have discretionary power to assess damages sustained by parties who have been injured because of an injunctive restraint ultimately determined to have been improperly granted. Russell v. Farley, 105 US 433, 444 et seq., 26 L ed 1060, 1064; Pease v. Rathbun-Jones Engineering Co. 243 US 273, 279, 61 L ed 715, 721, 37 S Ct 283, Ann Cas 1918C 1147. This power is, as stated, discretionary; there are of course cases where the Chancellor might properly conclude that parties should be remitted to an action at law. *But this is not one of those cases.* If petitioners had to bring actions at law, each of the seventy-six respondents might have to be made a defendant in a separate action. There is a controversy between the parties as to whether or not all of these respondents could be sued or served in the State of Missouri; to be compelled to sue some of them elsewhere would work a hardship on the state. *In addition to this, part of the damages for which petitioners seek recovery is made up of various items of cost and expense incurred in the litigation; if petitioners succeed on the merits, there might conceivably be serious problems raised by*

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million of claims for relief for damages, a large number of which may be the subject of judicial actions, which would impose great and unbearable burdens on the judiciary and great financial burdens on the victims of the illegal overcharges and the parties liable to the victims.

the seventy-six respondents as to the portion of damages fairly attributable to each — a problem peculiarly appropriate to equity, and pre-eminently adapted to settlement by a single court." 312 U.S. at 629-630, 61 S.Ct. at 788-789, 85 L.Ed. at 1088 (emphasis added).

As pointed out above in Part II A. hereof, the rule of the Supreme Court on equitable historic doctrine of restitution in maximum price enforcement actions (all actions under § 209) is the same in injunction actions in which injunction is later set aside, and overcharges are in an escrow fund. See *Porter v. Warner Holding Company, supra,* 328 U.S. 325 at 398 66 S.Ct. 1086 at 1089, 90 L.Ed. 1332 at 1337, for analysis and quotation stating controlling rule.

Dyke v. Gulf Oil Corporation (Dyke),
(TECA 1979) 601 F.2d 557

The actions involved in the *Dyke* case, *supra,* were private actions under § 210, wholly unlike the *Exxon Corporation* action under review and obviously distinguishable on this fact alone.

Further in the *Dyke* case, *supra,* this Court held that DOE may not be joined as a party in § 210 actions in the absence of compelling circumstances not present in that case. The *Dyke* opinion reiterates generally the "separation of public and private remedies" language, but does not discuss the issues of restitution under § 209.

There is an obvious distinction to be drawn between "commingling of private and agency enforcement devices" proscribed in the *Dyke* opinion, 601 F.2d 557 at 567, and the hearing of victims' claims to restitution under historic equitable and constitutional principles in a § 209 action, in which restitution may be made properly

and accurately, as authorized in the last sentence of § 209.

Bulzan v. Atlantic Richfield Company (Bulzan), (TECA 1980) 620 F.2d 278

This action by the plaintiff Bulzan was again a private action under § 210, and wholly distinguished from the action under review, in which relief was secured on a claim under § 209.

This Court in its opinion in the *Bulzan* case, *supra,* held that a remedial order by the agency does not bar a private action under § 210, because of the "dual enforcement scheme that Congress incorporated into its regulatory plan." *Bulzan, supra,* 620 F.2d at 284.

The *Bulzan* case arose out of an agency remedial order which required the violator to make compensation to the injured private party. It is very clear from the *Bulzan* opinion that restitution under § 209 is to be made in the action under § 209 to injured parties, for the opinion states that an award under § 210 may be adjusted to take into account that type of earlier award under § 209. *Bulzan, supra,* 620 F.2d at 283-284.

Citronelle-Mobile Gathering, Inc. v. Edwards (*Citronelle*), (TECA 1982) 669 F.2d 717

The holding of this case is directly contrary to the conclusion reached by the majority. The *Citronelle* case is discussed as a controlling case of this Court earlier in this dissenting opinion in Part I B. on judicial equitable principles of restitution. This earlier discussion is incorporated here by reference, and the following additional comment is made here.

On facts similar to those in these appeals, the TECA Panel in *Citronelle, supra,* rejected the argument that it was impossible to make restitution to the injured parties

because they were to numerous. The Court in the *Citronelle* case, *supra,* stated:

> "We face the brilliant rationale of the trial court in its envision of millions of customers along the east coast having been overcharged." *Citronelle, supra,* 669 F.2d at 722.

But this Court, in the *Citronelle* case, did not give up and stop at the possibility that millions of persons were overcharged; on the contrary the Court went on to state:

> "Clear, however, is the fact that the sale of the overpriced oil was made to determinable utilities and other institutions along the Atlantic seaboard. Faced with a statute that specifically authorizes restitution, but makes no provision for direct payment to the treasury, we turn to *University of California, supra,* (472 F.2d 1065) which ordered refunds of excess charges for football tickets.
>
> > While this Court recognizes the considerable burden that such a refund demand places . . . we recognize also the right of the agencies to require it.
>
> *Id.* at 1070.
> We believe such a process to be a reasonable application of the power of the district court." *Citronelle, supra,* 669 F.2d at 722.

In the above quotations this Court held that the District Court in restitution proceedings must look for any identifiable victims of the overcharges, and that it makes no difference if the wrongdoer is caused "considerable burden" in making refunds.

The opinion in the *Citronelle* case, *supra,* goes on to state in 669 F.2d at 723 that "the Government has a *duty* to try to ascertain those overcharged . . ." This statement

is the basis of the holding that the District Court must implement that duty by a judgment in restitution.

Cities Service Company v. Federal Energy Adminstration (Cities Service)
(TECA 1975)) 529 F.2d 1016

The *Cities Service* case, *supra,* did not involve an action under § 209 or issues off restitution, due process or intervention, as in this case. The *Cities Service* case, *supra,* was an action to enjoin enforcement of the old oil Entitlements Program.

The opinion in the *Cities Service* case, *supra,* states that the basic purpose of the Entitlements Program was to spread the burden of uncontrolled oil prices among "all sectors of the petroleum industry, all regions of the country, and among all consumers of petroleum products," *Cities Service,* 529 F.2d at 1021. The *Cities Service* opinion states that all sectors of the petroleum industry were to bear the burden of increased oil prices and nowhere states that consumers were to bear the entire burden of price increases or that a district court could summarily find that unidentified "ultimate consumers" were the only victims of illegal overcharges. Moreover, the language quoted above in the *Cities Service* case, *supra,* is addressed to the purpose of the Entitlements Program, and there is no evidence that reality inevitably conformed to the intentions of the agency in promulgating the Entitlements Program.

Further, the facts discussed in the recent entitlements exception regulations 10 C.F.R. 211.69 cited in Addendum No. 2 hereof, including the Entitlements Adjustment Mechanisms, are contrary to the inferences drawn in the majority opinion from the *Cities Service* case, *supra.* For example, under 10 C.F.R. § 211.69, DOE authorizes and may pay out of illegal owercharge funds restitution of

benefits owing but unpaid as exception relief from the Entitlements Program.

Midwest Petroleum Company v. U.S. Department of Energy (Midwest), (TECA 1985) 760 F.2d 287

In the *Midwest* case, *supra,* there *was no finding that there were illegal overcharges* by Fina, the seller, in any amount. As clearly recited in the opinion of this Court, "[w]ithout any finding that Fina was in fact liable for any overcharges, DOE and Fina agreed to the Consent Order at issue in this case." *Midwest, supra,* 760 F.2d at 288. The consent order *provided for payment of damages from illegal overcharges to alleged victims.* Thereafter the proposed consent order was published for comment in the Federal Register. Notice of adoption of the Order by DOE was later published in the Federal Register. Each of the appellants including Midwest accepted the settlement, and signed a release giving up the right to sue separately under § 210 or the federal petroleum price regulations "based on any 'act, matter, case, statement, conduct, practice or thing whatever. . . .'" *Midwest, supra,* 760 F.2d at 289. The action by Midwest was to rescind the releases for illegality and fraud. The holding was that the releases were valid and that there was no proof "that the $14 million settlement represented . . . overcharges." *Midwest, supra,* 760 F.2d at 292. The *Midwest* case is not in point in this case where there was a finding of overcharges, no release, and no grounds shown to rescind a release given by any victim of the overcharges.

Payne 22, Inc. v. United States of America (Payne 22), (TECA 1985) 762 F.2d 91

The facts in this case were essentially like those in the preceding *Midwest* case, *supra.* The *Payne 22* case, *supra,* involved (a) a Consent Order signed by the seller Sun Oil

Company and DOE; (b) a finding by DOE of no evidence of overcharges; (c) a payment of refunds to certain purchasers of crude oil; (d) publication of the Consent Order in the Federal Register for comment; (e) a failure to comment by Payne 22; (f) publication of adoption of the Consent Order by DOE; and (g) a class action fifteen months later by Payne 22. This case is obviously not in point. Further the Court in the *Payne 22* case clearly and expressly distinguished that case from *Citronelle-Mobile Gathering, Inc. v. Edwards, supra,* in the following words:

> "Payne cites *Citronelle-Mobile Gathering, Inc. v. Edwards,* 669 F.2d 717 (Temp. Emer. Ct. App.) *cert. denied,* 459 U.S. 877 (1982) to support its contentions. There, however, the district court concluded that Citronelle had violated the Regulations and determined who had been overcharged. Here, on the contrary, in the Consent Order the DOE alleges no violations by Sun and Sun denies any violations of the Regulations." *Payne 22, supra,* 762 F.2d at ____.

This quotation supports the differing conclusions of this dissenting opinion rather than those of the majority.

D.

Selected Leading Cases from Circuit Courts of Appeals on Duty and Power to Order Restitution

The following leading cases of the Circuit Courts of Appeals of the United States define the duty and power of a District Court, improperly issuing an injunction, to order restitution of damages caused thereby, to the parties suffering the damages: *Middlewest Motor Freight Bureau v. United States* (*Middlewest*), (C.A.8 1970) 433 F.2d 212, cert. denied, 402 U.S. 999, 91 S.Ct. 2169, 29 L.Ed.2d 165 (1971); *Coyne-Delaney Co. Inc. v. Illinois Capital Development Board,* (C.A.7 1983) 717 F.2d 385 at

390-392; *State of Tennessee ex rel. Leech v. Dole,* (C.A.6 1984) 749 F.2d 331 at 337; *U.S. v. Coca-Cola Bottling Company of Los Angeles,* (C.A.9 1978) 575 F.2d 222 at 228, cert. denied, 439 U.S. 959, 99 S.Ct. 362, 58 L.Ed.2d 351 (1978); *Commodity Futures Trading Commission v. Hunt,* (C.A.7 1979) 591 F.2d 1211, cert. denied, 442 U.S. 921, 99 S.Ct. 2848, 61 L.Ed.2d 290 (1979); *Securities and Exchange Commission v. Texas Gulf Sulphur Company,* (C.A.2 1971) 446 F.2d 1301 at 1307, cert. denied, 404 U.S. 1005, 92 S.Ct. 561, 30 L.Ed.2d 558 (1971); *Moss v. Civil Aeronautics Board,* (C.A.D.C. 1975) 521 F.2d 298 at 306, cert. denied, 424 U.S. 966, 96 S.Ct. 1460, 47 L.Ed.2d 732 (1976); *Interstate Commerce Commission v. B & T Transportation Co.,* (C.A.1 1980) 613 F.2d 1182.

These cases confirm the uniform application of the equitable duty and power to order restitution in injunctive actions against enforcement as well as in enforcement actions. In all of the injunction cases, the inherent duty and power of the District Court to make restitution, to devise procedures, and to make equitable awards for the purpose of restitution, were recognized by the Circuit Courts of Appeals.

In the *Middlewest* case, *supra,* for example, the Court of Appeals stated the generally recognized principles on restitution as follows:

> "IV. RESTITUTION AS A REMEDY FOR LOSSES SUFFERED BY VIRTUE OF AN INJUNCTION
>
> "The issuance of an injunction will in many cases cause financial losses to interested parties as well as prevent irreparable injury to the procurers. More importantly in cases such as this, where the restraint is directed against an order of an administrative agency charged with regulating rates to be charged

to the public at large, the injunction may cause substantial losses to the general public which can never be adequately compensated. In such cases, it is the duty of the court issuing the injunction to take necessary measures to protect the interests of parties before it, as well as the public interest. (This was done in this case by the issuing judge prudently requiring a substantial bond before issuing the temporary restraining order. The temporary restraining order is customarily issued, and usually ex parte, to maintain the status quo pending a detailed review on the merits.)

"For some time, it was thought to be the law in the federal courts that the only remedies available to parties injured by the issuance of an injunction were an action for damages on the injunction bond, if one had been required, in which case the amount recoverable was limited to the amount of the bond, or in the absence of a bond, an action for malicious prosecution where applicable. Russell v. Farley, 105 U.S. 433, 26 L.Ed. 1060 (1881). The substantial limitations inherent in these remedies are readily apparent.

"But in 1919, the Supreme Court significantly expanded the protection to be accorded injured parties by allowing recovery in the nature of restitution in cases where that remedy might be appropriate. Arkadelphia Milling Company v. St. Louis S. W. Ry. Co., 249 U.S. 134, 39 S.Ct. 237, 63 L.Ed. 517 (1919)." *Middlewest*, 433 F.2d 212 at 225.

The additional cases from the Circuit Courts of Appeals of the United States, cited above, are in agreement with the holding in the *Middlewest* case, *supra*, quoted above.

E.

Selected Controlling General Authorities on Duty and Power to Order Restitution in Equitable Injunctive Actions and Enforcement Actions

The general legal authorities on the subject of restitution are in agreement with the controlling judicial authorities of the Supreme Court of the United States, of this Court and of the Circuit Courts of Appeal reviewed above. This is demonstrated by the following generally recognized authoritites: *Restatement of the Law of Restitution*, Topic 1, Underlying Principles and § 74 applying to judgments reversed or set aside, *Restatement of the Law of Restitution 2d* (Tentative Draft No. 1, April 1983), § 1 on Underlying Principles of Restitution, § 1(e) *Fault and wrongful conduct* at pages 13 and 14, § 1(i) *Source of benefit* at pages 22 and 23; II Palmer, *The Law of Restitution* (1978) § 9.19 at pages 290 and 291 on judgments subsequently reversed or set aside; Moore's *Federal Practice*, Second Edition, ¶ 38.11[6] note 8 and ¶ 65.10[1].

II

Controlling Decisions on Nature of Required Hearings for Restitution

A.

Selected Controlling Decisions of the Supreme Court of the United States on the Nature of the Right to Restitution of Parties Damaged by Violations of Valid Statutes or Regulations or Both

It is a conclusion of this dissent that with the duty and power of district courts to order restitution in enforcement and injunction actions, there exists a correlative right in parties damaged to restitution in judicial actions whether enforcement actions (including those authorized by § 209 of the ESA) or private injunction actions against enforcement, in which the injunction is improperly issued. To further define the remedies available for these rights to restitution, it is necessary and desirable to determine the nature of these rights to restitution in the federal constitutional sense and in the federal equitable sense.

The right to recover monetary and other damages caused by a violation of law, including a legal administrative regulation, is a property right protected by the Due Process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States (and perhaps other clauses).

A recent controlling decision of the Supreme Court of the United States that the nature of these rights to restitution of monetary and other damages is a property right under the Due Process clauses is *Logan v. Zimmerman Brush Company (Logan)*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), in which the Supreme Court stated that "a cause of action is a species of property"

citing *Mullane v. Central Hanover Bank and Trust Company (Mullane)*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The Supreme Court in *Logan, supra,* went on to state:

> "The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." 455 U.S. at 429, 102 S.Ct. at 1159, 71 L.Ed.2d at 273.

Civil litigants who seek judicial restitution by recourse to the courts are seeking to protect a property right. Other decisions supporting this basic classification of a cause of action or claim for damages as a property right are: *Mullane, supra,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); *Cleveland Board of Education v. Loudermill (Loudermill)*, 460 U.S. ___, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

The recognized texts on constitutional law in accord are: Nowak, Rotunda and Young, *Constitutional Law* (Second Edition) Chapter 15, Section II D, 546-553; Antieau, *Modern Constitutional Law,* § 7:11 to § 7:16, 540-548 in terms of "Civil Justice"; Tribe, *American Constitutional Law,* § 10-8 to § 10-11, 506-532, tracing the historical development of procedural due process in the context of protected interests.

B.

Selected Controlling Decisions on the Nature and Scope of Right to Due Process of Those Damaged by Violation of Valid Statutes or Regulations or Both

Having recognized that the parties damaged by violations of statutes or regulations, or both, have the right to Due Process under the Fifth Amendment and under

historical jurisprudence, this dissenting opinion must define the procedural due process to which they are entitled. Each party that may have a federal claim for restitution is entitled under the Due Process clause of the Fifth Amendment to notice and an opportunity for a judicial (or quasi-judicial administrative) hearing and decision on the claim for restitution. The selected controlling decisions of the Supreme Court of the United States defining the basic procedural due process rights required in federal judicial actions are as follows:[7] *Logan, supra,* 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982); *Mullane, supra,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); *Loudermill, supra,* 470 U.S.____, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

In *Logan, supra,* the Supreme Court stated:

> "Justice Jackson, writing for the Court in Mullane v. Central Hanover Bank & Trust Co., 339 US 306, 94 L Ed 865, 70 S Ct 652 (1950), observed: 'Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' Id., at 313, 94 L Ed 865, 70 S Ct 652. At the outset, then, we are faced with what has become a familiar two-part inquiry: we must determine whether Logan was deprived of a protected interest, and, if so, what process was his due.
>
> "The first question, we believe, was affirmatively settled by the Mullane case itself, where the Court

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[7] A similar administrative procedural right to due process required of regulatory administrative agencies exercising delegated quasi-judicial functions will be discussed hereinafter.

held that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan*, 455 U.S. at 428, 102 S.Ct. at 1153, 1154, 71 L.Ed.2d at 273 (footnote omitted).

C.

Selected Controlling Decisions on the Type of Hearing on Claims for Restitution Required by Procedural Due Process in Judicial Actions in Which Injunctions are Improperly Issued Before Final Judgment

In the controlling cases cited in Part I A., *Selected Controlling Decisions of Supreme Court of the United States on Duty and Power to Order Restitution*, it is uniformly held that the District Court has the duty and flexible equitable power to do equity and mould each decree to the necessities of the particular case, so long as procedural due process is accorded all persons claiming constitutionally protectable property and other rights. For example, in an equitable private enforcement action, similar in substance to an action under § 209, the District Court was ordered to employ all its equitable powers of a broader and more flexible character than usual because of the public interest. *Warner Holding, supra*, 328 U.S. at 398, 66 S.Ct. at 1089, 90 L.Ed. at 1336, 1337. And in *Morgan II, supra*, 307 U.S. at 193, 194, 59 S.Ct. at 801, 83 L.Ed. at 1218, 1219, the Supreme Court stated the manner of moulding the remedies in the District Court, a court of equity, performing its duties to order restitution, may be affected by the public interest involved.

Under familiar principles of procedural due process, the Supreme Court has consistently held that under the Due Process clauses, in addition to notice, *some form of hearing* is required before an individual or other party can be deprived of a property interest. *Matthews v. Eldridge (Eldridge)*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18

(1976); *Goldberg v. Kelly (Goldberg)*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); *Loudermill, supra*, 470 U.S. ____, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). In *Eldridge, supra*, the rule was summarized as follows:

> "This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. Wolff v McDonnell, 418 US 539, 557-558, 41 L Ed 2d 935, 94 S Ct 2963, 71 Ohio Ops 2d 336 (1974). See, e.g., Phillips v Commissioner, 283 US 589, 596-597, 75 L Ed 1289, 51 S Ct 608 (1931). See also Dent v West Virginia, 129 US 114, 125-125, 32 L Ed 623, 9 S Ct 231 (1889). The 'right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.' Joint Anti-Fascist Comm. v McGrath, 341 US 123, 168, 95 L Ed 817, 71 S Ct 624 (1951) (Frankfurter, J., concurring). The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' Armstrong v Manzo, 380 US 545, 552, 14 L Ed 2d 62, 85 S Ct 1187 (1965). See Grannis v Ordean, 234 US 385, 394, 58 L Ed 1363, 34 S Ct 779 (1914)." *Eldridge*, 424 U.S. at 333, 96 S.Ct. at 902, 47 L.Ed. 2d at 32.

D.

Selected Controlling Decisions on the Nature of Required Hearings for Restitution in Judicial Actions in Which No Injunction was Issued Before Final Judgment

In judicial actions in federal courts involving restitution of charges and other injuries caused by a violation of a statute or regulation, or both, fixing maximum charges, the type of hearing required in addition to notice must be

adequate to satisfy the procedural Due Process clause of the Fifth Amendment, but is flexible and may be devised to satisfy the existing circumstances and the public interest. *See Warner Holding, supra,* 328 U.S. 395, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946); *Morgan II, supra,* 307 U.S. 183, 59 S.Ct. 795, 83 L.Ed. 1211 (1939); *Eldridge, supra;* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Goldberg, supra,* 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); and *Loudermill, supra,* 470 U.S. ——, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); at the pages cited above.

E.

Selected Controlling Decisions on the Nature of Required Hearings for Restitution in Administrative Proceedings

In many instances a fully functioning regulatory administrative agency of the Executive Branch may exercise statutorily delegated quasi-judicial functions, as well as delegated quasi-legislative and quasi-executive functions.[8] Before decontrol (or "deregulation") in January 1981 and for some time thereafter, the Department of Energy (DOE) exercised such quasi-judicial functions in determining violations and providing remedies for victims of violations. These functions were performed through proceedings for Notice of Probable Violations (NOPV), hearings thereon and proposed Remedial Orders. See Subpart V. 10 CFR § 205.280 through § 205.288 (1983), on administrative procedures of DOE for notice and hearing on alleged violations; See also Subpart O, 10 CFR

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[8] 1 Mezines, Stein & Gruff, *Administrative Law* § 1.01, 1-2 note 2, relying on and citing *The Nature of Administrative Law* by E. Barrett Prettyman, 44 Va. L. Rev. 685 (1958). Judge Prettyman was Chairman of the President's Conference on Administrative Procedure, 1953-1955. Also see Schwartz, *Administrative Law*, Second Edition § 5.6.

§ 205.190 through § 205.199J (1983), on procedures for administrative remedial action and orders.

Properly applied, these quasi-judicial administrative procedures of DOE, subject to judicial review by the federal courts under the Administrative Procedure Act, were adequate to provide procedural Due Process under the Fifth Amendment. For examples, see the decision of this Court in *Missouri Terminal Oil Company v. Edwards*, (TECA 1981) 659 F.2d 139, and Edles & Nelson, *Federal Regulatory Process*, Chapter 5 and 1984 Supplement.

The very recently published work 1 Koch, *Administrative Law and Practice* (West Publishing Company 1985), Chapter 7, §§ 7.1 to 7.8 contains an excellent exposition of the historical and expanding application of the Due Process clause of the United States Constitution to administrative processes. Among other citations, this work cites cases of the Supreme Court of the United States from *Mullane, supra*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), to *Eldridge, supra*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), followed in this dissenting opinion.

But following decontrol in January 1981, the change in personnel, policies, regulations, procedures and the practices of DOE has changed the administrative processes which provided restitution to the victims of violations. These changes have drawn DOE and the violators of statutes and regulations into new controversies about the sufficiency and legality of the actions of DOE, violators and alleged violators of statutes and regulations, under the duty and obligation to make restitution as declared by the controlling decisions of the Supreme Court of the United States and of this Court, summarized above.

III

Decisions And Authorities On Intervention And Interpleader

A.

Rights of Claimants to Damages to Intervene in Restitution Proceedings and to Notice and Opportunity to be Heard in District Court

Following the filing on March 2[illegible] of its decisive Memorandum Opinion reported in 5[illegible] F.Supp. 816-864, containing comprehensive findings of fact and conclusions of law, the District Court directed plaintiff DOE to submit a form of proposed judgment in 15 days, 561 F.Supp. at 859. Defendant Exxon was ordered to file its reply thereto within 10 days thereafter. 561 F.Supp. at 859. The District Court, without allowing intervention and without notice to or opportunity for hearing by claimants to restitution of damages caused by Exxon's violations, in the Memorandum Opinion of March 25, 1983 found the facts that restitution to any of the victims of the overcharges was impossible in the following excerpt:

> "At the same time, price regulations applicable to refiners allowed them to pass along the inflated costs of Hawkins Field crude oil to purchasers of refined products. Under those rules the price a refiner could charge for a refined product was generally limited to the refiner's May 15, 1973 price plus, among other costs, the increased cost of crude oil. 10 C.F.R. § 212.83(c)(2)(iii). Similar pass-through provisions for increased costs also applied to crude oil resellers, product resellers and retailers. *See* 10 C.F.R. Part 212, Subparts F and L. As a result of the pervasive system of price controls which then existed, therefore, Exxon's overcharges were not, as it simplistically asserts, borne by Exxon itself, but instead were

borne by ultimate consumers of petroleum products throughout the entire country.[56]

(Footnote) "[56] On November 23, 1982 and on January 20, 1983, certain refiners and independent retailers, respectively, filed motions to intervene in this action, arguing that they as victims of the Hawkins Field overcharges were entitled to any recovery DOE might obtain. *The preceding discussion shows, however, that due t[illegible] workings of regulations applicable throughou[illegible] from producer to retailer, the real [illegible] re [illegible] unidentifiable millions of ultimate consum[illegible] troleum products.* Accordingly, the motions to intervene are denied. (Emphasis added.)

"The broad scattering of the ill effects of Exxon's wrongdoing renders impossible the tracing of the overcharges to their ultimate victims and the calculation of the precise damages suffered by each. Yet this court is still faced with the task of fashioning an equitable remedy." 561 F.Supp. at 853.

The findings of fact and conclusions of law of the Memorandum Opinion of March 25, 1983 were incorporated without change by reference, in a "JUDGMENT," entered June 7, 1983, which did not mention expressly any claims to restitution or pending petition and counterclaim for interpleader. R. 31658-60. The judgment of June 7, 1983 recites that "the matter came before the Court on the parties' cross-motions for summary judgment," referring to the motions for summary judgment of the United States and Exxon described in the Memorandum Opinion. 561 F.Supp. at 818. The judgment of June 7, 1983, at R. 31659, implemented by reference the finding, quoted above, made without hearing the claimants to restitution, that "[t]he broad scattering of the ill effects of Exxon's wrongdoing renders impossible the tracing of overcharges

to their ultimate victims and the calculation of the *precise* damages suffered by each." 561 F.Supp. at 853 (emphasis added). No authority is cited for the assumption that damages to the victims must be *precisely*[9] calculated. On this basis the District Court in the judgment of June 7, 1983 ordered the overcharges of $1,635,604,638.10 and interest to be deposited by Exxon "into an interest-bearing Treasury escrow account" to be "held in trust by the Treasury" to be disbursed to each of the States and other eligible jurisdictions pursuant to instructions "consistent with this court's Memorandum Opinion of March 25, 1983. . . ." R. 31659.[10] Review of the propriety of the proceedings on restitution issues, intervention and interpleader requires a summary of the record in the District Court, which follows.

B.

Orders of the District Court Denying and Allowing Intervention, Imposing Limitations on Intervenors and Dates Thereof

Before the filing of the Memorandum Opinion of March 25, 1983, the District Court had stayed the filing of applications to intervene by industry applicants. R. 38985, 39006. Later on April 29, 1983, the District Court belatedly but properly found the applications to intervene to be timely and that the applicants, who are intervenor-appellants herein, had a right to intervene under Rule

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[9]The law may require only proof of damages by a preponderance of the evidence "with a reasonable certainty." 22 Am.Jur.2d *Damages*, § 22, pages 40-42. The degree of certainty required may be less when the uncertainty is caused by the party at fault. 22 Am.Jur.2d *Damages*, § 23.

[10]In an Order dated June 17, 1983, the District Court found that "plaintiff and intervenors will not be prejudiced by the issuance of an unsecured stay" and ordered the June 7, 1983 judgment stayed "pending final disposition of all appeals in this case and for a period of 30 days following the issuance of a mandate. . . ." R. 31665.

24(a)(2). In each instance, the intervention of right was properly granted but, this dissenting opinion concludes, contrary to law the intervention was limited to intervention for the purposes of appeal on the remedy issue (with a limited privilege to comment by some [illegible] ors). R. 31607-12. A summary of these orders follows.

1. *Orders Denying Intervention Before Judgment of June 7, 1983.*

The District Court on March 25, 1983 in its Memorandum Opinion denied in note 56 "motions" (properly, applications) to intervene, filed November 23 or 24, 1982 and January 20, 1983, for purposes of restitution described later, of "certain refiners" and "independent retailers." These applicants claimed to be victims of the overcharges later found to have been made by Exxon. The denial of these applications was based on the finding, made without an opportunity by the applicants for intervention to be heard, that "the real victims are the unidentifiable millions of ultimate consumers of petroleum products." 561 F.Supp. at 853, note 56, quoted in full above, and expanded in the text, 561 F.Supp. at 853, 854.

One of the "motions" (properly, applications) to intervene denied in note 56 of the Memorandum Opinion of March 25, 1983 was the Conditional Motion of Indicated Refiners to Intervene filed November 23 or 24, 1982 (stated in note 56 as November 23, 1982). R. 38960-65. This motion (application) to intervene was conditioned only on a decision of the Court granting judgment for plaintiff that defendant has violated the crude oil price regulations of DOE by overcharges; in that event the Indicated Refiners (intervenor-appellants herein) requested that the District Court conduct further proceedings permitting all interested parties to be heard on the issue of ultimate disposition of the overcharges, and

ultimately to enter judgment for distribution to participants in the "Old Oil Entitlements Program" (R. 38960-1). This was a request in detail for appropriate restitution proceedings, and intervention therein, which should have been granted or otherwise satisfied. Intervention by the Indicated Refiners was later granted after the decisions of March 25, 1983 but only for the purpose of appeal, as stated hereinafter. R. 31408.

The other of the "motions" (properly, applications) to intervene denied on March 25, 1983 in note 56 was the Petition for Limited Intervention of Luther Griffin and other independent retailers of gasoline (R. 38986-91). The petition (application) to intervene stated that DOE was not adequately representing the petitioners (applicants) and others. (In regard to the States, inadequate representation by DOE as defined by Rule 24(a)(2) was found later by the District Court. R. 38990.) The petition (application) was limited to restitutionary proceedings. R. 38990-1.

By orders of the District Court, entered before March 25, 1983, consideration of these two applications ("motion" and "petition") was stayed. R. 38895, 39006. Without vacating the stay orders and without hearing, these two "motions" (applications) were denied in note 56 of the Memorandum Opinion of March 25, 1983. 561 F.Supp. at 853. At the least, each should have been considered for granting before denial.

2. *Orders Allowing Intervention Before Judgment of June 7, 1983.*

On April 11, 1983, the District Court granted the "Conditional Motion" of the Indicated Refiners, previously denied and ordered that the refiner Champlin Petroleum Company, five other refiners and the American

Refiners Association "may intervene in this action solely for purposes of appeal on the remedy issue." R. 31408.

On April 29, 1983, by "Memorandum" (R. 31607-12) and "Order" (R. 31613-4), the District Court granted limited intervention to two groups of several named parties in each group, described as "A. Industry Intervenors" and "B. States." The Industry Intervenors were permitted to intervene "solely for the purpose of appeal on the issue of the proper remedy. . . ." The States were permitted to intervene "only for the purpose of appeal on the issue of the proper remedy" and of submitting limited comments on the "parties' proposed judgment." R. 31614. The "parties" referred to were United States and Exxon. R. 31607.

On May 5, 1983, Consumers Power Company and three refiners were permitted to intervene solely for the purpose of appeal on the remedy issue; and the States of Minnesota, New Jersey and West Virginia were permitted to intervene for the same limited purpose of appeal and limited comment stated in the Memorandum and Order of April 29, 1983. R. 31616-31619.

3. *Order Allowing Intervention on Date of Judgment, June 7, 1983.*

By "Order" of June 7, 1983, the District Court granted leave to intervene to "several additional states, territories, and the District of Columbia (the 'States')" and reconsidered *sua sponte* its denial of the "petition" of January 29, 1983 of Luther Griffin, *et al.*, ("Retailers") for limited intervention and granted leave to the Retailers to intervene only on their own behalf. R. 31661-2. The intervention of both the States and Retailers was "limited consistent with the order of this court of April 29, 1983. . . ." R. 31661-2.

4. *Orders Allowing Intervention After Judgment of June 7, 1983.*

On June 17, 1983, Philadelphia Electric Company (PECO) was granted leave to intervene in its own behalf only for the limited purpose of appeal on the issue of proper remedy as described in the Order of April 29, 1983.

On July 6, 1983, the Air Transport Association of America was granted leave to intervene for the limited purpose of appeal on the issue of proper remedy. R. 31680.

On July 6, 1983, Geraldine H. Sweeney, RJG Cab, Inc., and National Freight, Inc., were granted leave to intervene for the limited purpose of appeal on the issue of proper remedy. R. 31681.

C.

Validity and Effect of the Limitations On Right of Intervention

By denying intervention to claimants of constitutional property rights to restitution for a hearing or any other purpose,[11] it is submitted that the District Court failed to perform its constitutional and equitable duties and procedural duties under Rule 24(a)(2) and to exercise its powers to accord Due Process and historic equitable rights to the claimants seeking to intervene and possibly other claimants to restitution. See Parts I and II above and discussion in *Donaldson v. United States*, 400 U.S. 517, 91 S.Ct. 534, 27 L.Ed.2d 580 (1971).

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[11]The denial of intervention and hearing was before rendition of the Memorandum Opinion of March 25, 1983 and judgment of June 7, 1983, on grounds that "Exxon's wrongdoing renders impossible the tracing of the overcharges to their ultimate victims and the calculations of the precise damages suffered by each." 561 F.Supp. at 853.

This limitation of intervention to purposes of appeal was also contrary to Rule 24(a) which, in the absence of exceptional circumstances, permits only "housekeeping" limitations or limitations for efficiency on intervention of right under Rule 24(a)(2) F.R.Civ.P.[12]

Timely intervention of right in the District Court under Rule 24(a)(2) should not have been limited to the purpose of appeal. Limitation of intervention under rule 24(a)(2) is not authorized in absence of special circumstances not present in these cases. 7A Wright and Miller, *Federal Practice and Procedure*, § 1922, 623 at 625 and cases therein cited, where it is stated:

> "Thus, however desirable it may be that the courts have the power to impose reasonable conditions on the intervention of right, the fact that the Committee Note says that they have the power does not create the power if it does not otherwise exist. Nevertheless several courts have shown a willingness to accept the Note at face value and to allow the imposition of conditions on an intervenor of right. So long as these conditions are reasonable and are of a housekeeping nature, this view is likely to prevail. It seems very doubtful, however, that a court has the right to make significant inroads on the standing of an intervenor of right; and in particular, it should not be allowed to limit him in the assertion of counterclaims and other new claims." 7A Wright and Miller, *supra*, at 625-26. (Footnotes omitted.)

It is obvious that no limitation on constitutional procedural Due Process rights and historic equitable rights will be permitted, in intervention under Rule 24(a)(2).

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[12]The District Court expressly and properly found Rule 24(a)(2) to be applicable and satisfied in all particulars in granting intervention on April 29, 1983 before final judgment. R. 31609.

The same conclusion is reached in 3B *Moore's Federal Practice* (Second Edition) ¶ 24.07, ¶ 24.09 and ¶ 24.16. In 3B *Moore's, supra*, ¶ 24.09, there is discussed the lack of discretion to place significant limitations on intervention of right under Rule 24(a) as opposed to permissive intervention under Rule 24(b) which may be limited in the exercise of a judicial discretion. In 3B *Moore's, supra*, ¶ 24.16[4] discussing *Status of the Intervenor*, the right to press a claim of right by raising questions on the merits for protection of the intervenor is stated. So no limitations on constitutional and historic equitable rights to be heard are permitted.

D.

Proper Allowance of Intervention
Under Rule 24(a)(2) by the District Court

In its approach to decision on these applications for intervention, the District Court properly found a right to intervene under Rule 24(a)(2), stating:

> "In this case, the industry applicants — refiners, wholesalers, and retailers — all allege that they, not the ultimate consumers of petroleum products, bore the burden of Exxon's overcharges and are entitled to restitution. For purposes of deciding whether to allow intervention the court must accept a party's well-pleaded allegations as true, and cannot look behind those allegations to reach the merits of the applicant's claims as a basis for denying intervention. *United States v. AT&T, supra*, 642 F.2d at 1291. The industry applicants have properly pleaded an interest in the overcharges by Exxon, and so have satisfied the 'interest' test. The States, for their part, obviously have a strong interest in defending before this court and on appeal this court's decision that

they, on behalf of their citizens, are to receive restitution of the overcharges." R. 31609-10.

In the "Memorandum" on intervention of April 29, 1983 containing findings of fact and conclusion of law, the District Court concluded that it had the power to limit the scope of intervention to the purpose of appeal on the remedy issue, citing *U.S. v. American Telephone and Telegraph Company,* (C.A.D.C. 1980) 642 F.2d 1285, and *Smuck v. Hobson,* (C.A.D.C. 1969) 408 F.2d 175. R. 31611. In each of those cases there was a failure of any formal party to appeal, a circumstance not present in these appeals. Therefore, for that reason and probably other reasons, those two cases do not support the limitations on intervention to purposes of appeal in these cases. It is not desirable to extend this opinion by further discussion of the exceptional circumstances in those interesting cases, not present in these cases.

E.

1. *Claims of Intervenor-Appellant Public Utility Philadelphia Electric Company (PECO), Consumers Power Company and Other Public Utilities.*

Despite the fact that no notice and opportunity to file and prove claims for restitution were given to public utilities, Intervenor-Appellant Philadelphia Electric Company (PECO), an investor owned public utility, claiming to be damaged by the illegal overcharges of Exxon sought leave to intervene in its own behalf, and sought certification as representative of a class of investor owned utilities supplying electricity and gas to consumers. As stated in Part III B. 4. above, after the decisive Mamorandum Opinion and judgment of the District Court, this application to intervene was granted for the limited purpose of appeal on the issue of remedy only. R. 31681. The effect of this action of the District Court was to deny PECO the

right to intervene for purposes of filing and presenting any claim for restitution of damages.[13] (No comment will be made on the request for class certification because of the absence of a ruling by the District Court on the record and a fuller record.)

PECO and those joining in its brief on appeal, among other things, claim that the District Court erred in concluding without a hearing that all the overcharges were passed through to the ultimate consumers as a result of the pervasive system of price controls. They contend that the system of price controls (10 C.F.R Part 212) did not require passing through of increased costs but merely permitted it.

In regard to PECO it is reasonable to believe that PECO as public utility supplying electricity and gas to consumers may have included the illegal overcharges in its rate base; and that as a public utility PECO would have standing to present a claim for restitution on behalf of its ratepayers to the extent that the overcharges were passed on. This dissent asserts that to summarily deny a claim for restitution under these circumstances is error. This conclusion is clear under the decisions of the Supreme Court of the United States, cited above, including *Morgan II, supra*, 307 U.S. 183, 59 S.Ct. 795, 83 L.Ed. 1211 (1939), and *Interstate Natural Gas, supra*, 336 U.S. 577, 69 S.Ct. 775, 93 L.Ed. 895 (1949). Decisions of this Court, and of the Circuit Courts of Appeals, on the duty and power to order restitution clearly support this conclusion.

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[13]PECO, claiming to be an end user, has filed Joint Briefs with Geraldine H. Sweeney (Sweeney), RJG Cab Inc. (RJG) and National Freight Inc. (National Freight) alleged to be gasoline and diesel fuel consumers and end users in commercial and noncommercial motor vehicles.

Further, PECO and others claim that market forces may have prevented the passing through of the illegal overcharges. This is a possibility that may be a fact.

To the extent that PECO did not pass on the overcharges it may have a claim to restitution in its own behalf. In a related case we judicially noticed on the remedy issue that the DOE on reference by the District Court of Kansas filed an Interim Report of the Office of Hearings and Appeals (OHA) on the issue of the impact of illegal overcharges which reported that overcharges on natural gas may have been passed through to customers and that any refund may be passed through to customers. This Interim Report is quoted *verbatim* in part in *Department of Energy v. Hunt,* (TECA 1984) 734 F.2d 816 at 824-825. The memorandum and order of the District Court of Kansas retaining ultimate jurisdiction and referring the task of finding the facts concerning "the impact of the overcharges" to the OHA is reported in *In re: The Department of Energy Stripper Well Exemption Litigation (Stripper Well),* (D.Kan. 1983) 578 F.Supp. 586. It is judicially noticed that the presumably final *Report of the Office of Hearings and Appeals of the Department of Energy, (Report)* was filed in the District Court of Kansas shortly after June 19, 1985, the date of the signature thereon of the Director of the Office of Hearings and Appeals of the DOE. It is a conservative appraisal of this Report to find that at least some of the damages from the illegal overcharges for stripper well crude oil can be proven in approximate amounts, and in regard to public utilities in some instances in amounts passed on to its rate payers.

Most of what has been determined concerning PECO may apply to Consumers Power Company, whose application to intervene and the action thereon is described in Part III B. 2. above.

2. *Claims of the Appellant-Intervenors Users of Gasoline and Diesel Fuel in Motor Vehicles.*

As noted in footnote 13 in the section immediately above, Sweeney and other consumers and end users of gasoline and diesel fuel in commercial and non-commercial vehicles asserted in the District Court and in this Court on appeal claims for restitution of damages caused by the illegal overcharges of Exxon. Like PECO they were summarily denied the opportunity to file and present these claims in the District Court. This action was contrary to the controlling decisions on restitution of the Supreme Court of the United States, and of this Court, reviewed in detail above. The District Court had the constitutional and equitable duty and authority to provide a suitable notice and hearing of these claims, among others, and to award any proven demages.

At least, to the extent that evidence shows that the overcharges were not passed on to others, damages may be claimed.

3. *Claims of the indicated Refiners, Other Refiners, American Refiners Association, Independent Retailers, Industry Intervenors and States.*

As noted above in Part III B. 1., a group of refiners, entitled Indicated Refiners, and other refiners sought to intervene in November 1982 before the decisive Memorandum Opinion of March 25, 1983 and the judgment of June 7, 1983. R. 38960-65.

This group requested that the District Court conduct further proceedings on disposition of the overcharges and the effect on victims including the effect of the "Old Oil Entitlements Program" which may have caused damages to those affected by illegal overcharges which resulted from misclassification of "old oil," thereby wrongfully relieving purchasers thereof of payments to the Entitle-

ments Fund and adversely affecting amounts paid to beneficiaries of the Entitlements Fund.

The applications to intervene of the refiners, and the American Refiners Association, and the action thereon is described in Parts III B. 1. and III B. 2. hereinabove.

The rulings and discussions hereinabove covering the Indicated Refiners apply to the claims of the other refiners, including intervenor-appellants Gladieux Refinery, Inc., U. S. Oil and Refining Company, Marathon Petroleum Company, Mobil Oil Corporation and Murphy Oil Corporation, and possibly to the American Refiners Association, if it has standing to claim damages in any respect.

The applications to intervene of independent retailers of gasoline including Luther Griffin and the action thereon is described in Parts III B. 1. and III B. 3. above. These independent retailers were entitled to participate as claimants in restitution proceedings. It was error to limit their intervention solely to purposes of appeal on the remedy issue.

The applications to intervene of the States, including the District of Columbia, the "Industry Intervenors" and the actions thereon are described in Parts III B. 1., III B. 2. and III B. 3. hereinabove. The limitations on intervention by these applicants to purposes of appeal on the issue of remedy was unauthorized.

Intervenor-Appellant Tosco Corporation (Tosco) and others described as small and independent refiners were permitted to intervene solely for the purpose of appeal. Tosco and six others were interpled by Exxon as crude purchasers against whom interpleader and declaratory relief were sought. Tosco and the six other refiners were entitled to notice and hearing on their claims to restitution.

Further, reasonable notice and opportunity to intervene in restitution proceedings should have been given to qualified claimants, including those who did not file applications to intervene.

4. *Claims of Air Transport Association of America and Members.*

The post-judgment action on the application of the Air Transport Association of America (Air Transport) to intervene limiting the intervention to the purpose of appealing the issue of proper remedy is described in Part III B. 4. hereinabove. The Intervenor-Appellant Air Transport states that its action is taken on behalf of 29 airlines, listed in Appendix A of its brief in this Court, that are direct purchasers from Exxon and end user consumers of kerosene base aviation jet fuel (kerojet).

While Air Transport as an association may, or may not have standing to claim damages sustained by its members, each of its members that was a direct purchaser and end user of jet fuel, the cost of which was increased by the overcharges, should have reasonable notice and an opportunity to present its claim to damages in restitution proceedings.

An airline which was an end user of the jet fuel may have passed on the illegal overcharges to its passengers, customers and others. But it cannot be assumed summarily that all damages were wholly passed on to the passengers and customers of any airline that claims the contrary. It is judicially noticed that an airline may at times be unprofitable and unable to pass on all its costs, and unable to make a normal profit.

F.

Conclusion on Right of Intervenors and Other Claimants to Restitution, Notice and Hearing

The (1) unconstitutional denial of procedural Due Process, to claimants to restitution, (2) the improper limitations on the right to intervene under Rule 24(a)(2) F.R.Civ.P., and (3) the rendition of a summary judgment without hearing and without an adequate factual basis, considered separately and jointly, it is submitted, were prejudicial errors in respect to all claimants to restitution. Before the District Court as a constitutional court of equity, proceeding in the exercise of its discretion, may order disposition of the funds remaining after satisfying all meritorious claims for restitution, the law requires as a minimum, notice and an opportunity for a hearing for all claimants to restitution.

G.

Failure to Consider Petition for Interpleader

In addition to failing to consider intervention requested before the decisive Memorandum Opinion of March 25, 1983 was entered, no action was expressly taken by the District Court to grant or deny the Petition and Counterclaim for Interpleader and Declaratory Relief of Exxon, filed December 5, 1980 (R. 105-302), requesting that appellant Tosco and six other "Crude Purchasers," listed in Exhibit B thereto (R. 283), over 2,000 "Selling Owners" of crude oil from Hawkins Field, listed in Exhibit A thereto (R. 114-282), and the plaintiff United States be ordered to interplead their respective claims to the alleged *excessive purchase prices and refunds* (R. 111). On February 5, 1981 the District Court *sua sponte* by an "Order" chose to "defer consideration and resolution of the administrative problems" caused by the

Petition and Counterclaim for Interpleader and Declaratory Relief (R. 864). In the same order the Court provided that the defendants named in the Petition and Counterclaim "answer or otherwise respond within 20 days from the date of service of notice by this court that such answers or other responses shall be filed." R. 865. There is no record that the notice was ever filed or served on the United States, the Selling Owners or Crude Purchasers. This opportunity to begin restitution proceedings through interpleader was preempted without notice and hearing by the judgment of June 7, 1983.

IV

Improper Summary Judgment on Restitution

In addition to violation of the constitutional principles, and the equitable historic duty and power to order restitution after notice and hearing, this dissenting opinion concludes that the District Court improperly rendered a summary judgment on restitution in implementing, in its judgment of June 7, 1983, its conclusion that it was impossible to identify the victims of the overcharge and determine the precise amount of damages, quoted above from its Memorandum Opinion of March 25, 1983. No proof exists in the record to support this factual conclusion; nor is any supporting proof cited by the District Court. If this conclusion of the District Court in whole or part is based on judicial notice, the judicial notice of the underlying facts was unauthorized without a hearing, Rule 201(e), F.R.E., and probably unauthorized in any event. 1 *Weinstein's Evidence* ¶ 201[03], from Davis, *A System of Judicial Notice Based on Fairness and Convenience,* Perspectives of Law, 69 at 93 (1964), as follows:

> "The reason we use trial-type procedure, I think, is that we make the practical judgment, on the basis of experience, that taking evidence subject to cross-

examination and rebuttal, is the best way to resolve controversies involving disputes of adjudicative facts, that is, facts pertaining to the parties. The reason we require a determination on the record is that we think fair procedure in resolving disputes of adjudicative facts calls for giving each party a chance to meet in the appropriate fashion the facts that come to the tribunal's attention, and the appropriate fashion for meeting disputed adjudicative facts includes rebuttal evidence, cross-examination, usually confrontation, and argument (either written or oral or both)."

The power of the District Court to render this summary judgment on its own initiative, without hearing, was not authorized by the Federal Rules of Civil Procedure, or by Rule 56 in particular. The cases supporting this conclusion are too numerous to list and discuss, but the leading controlling cases of the Supreme Court of the United States are *Sartor v. Arkansas Natural Gas Corporation*, 321 U.S. 620, 64 S.Ct. 724, 88 L.Ed. 967 (1944); *Arenas v. United States*, 322 U.S. 419, 64 S.Ct. 1090, 88 L.Ed. 1363 (1944); *Weinberger v. Hynson, Westcott & Dunning*, 412 U.S. 609, 93 S.Ct. 2469, 37 L.Ed.2d 207 (1973); *Elgin Joliet & Eastern Railway Company v. Burley*, 325 U.S. 711, 65 S.Ct. 1282, 89 L.Ed. 1886 (1945), decision adhered to on rehearing, 327 U.S. 661, 66 S.Ct. 721, 90 L.Ed. 928 (1946); *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962); *White Motor Company v. United States*, 372 U.S. 253, 83 S.Ct. 696, 9 L.Ed.2d 738 (1963); *Agosto v. Immigration and Naturalization Service*, 436 U.S. 748, 98 S.Ct. 2081, 56 L.Ed.2d 677 (1978). These cases are chosen in 6 *Moore's Federal Practice*, Second Edition, ¶ 56.15[1-00], as the leading cases from the Supreme Court that state that Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it

is quite clear what the truth is, and that no genuine issue remains for trial. A very large number of cases in accord are collected in 6 *Moore's, supra,* ¶ 56:15. In 10A Wright, Miller and Kane, *Federal Practice and Procedure,* § 2725 at pages 95-112, the same rule is stated citing many cases in accord. Further, in § 2725, *supra,* at page 112, the rule is stated that normally the court should notify the interested parties before rendering summary judgment in order to allow briefing and argument. In this case neither the parties designated as interpleader defendants in the petition and counterclaim by Exxon nor the applicants for intervention before the District Court before June 7, 1983 were notified or given an opportunity to be heard.

It is assumed that a summary judgment on the issues of restitution, if otherwise appropriate, may be entered on the initiative of the District Court as in this case, and that a summary judgment on restitution issues may be rendered without being so entitled as in this case. But such a summary judgment may not be entered without notice and hearing in the circumstances of this case. The District Court did in fact, if not in name, issue an unauthorized summary judgment on restitution issues, made easier by the limitations on the scope of intervention, the times of intervention and the stay of the interpleader issues, all without hearing those claiming to be victims of the violations of law by Exxon.

No Discretionary Equitable Disposition of Damages to Unidentifiable Victims Should Be Made Before Attempting to Identify and Make Restitution to Actual Victims

As discussed above, the District Court concluded without notice and hearing that it was impossible to trace the damages caused by the illegal overcharges of Exxon to the parties that were harmed thereby. Therefore, the

District Court chose as a remedy to use by analogy the procedures of the "Warner Amendment," P. L. 97-377, § 155, 96 Stat. 1919-1920 (1982). The Warner Amendment, 96 Stat. 1919, required overcharge refund payments be directed to the States (as defined) for use in one or more of five listed energy conservation programs when the victims of the overcharges could not be identified.

The District Court in the its Memorandum Opinion of March 25, 1983, at 561 F.Supp. at 856-857 stated:

> "The court shall order Exxon to make restitution to the United States Treasury of the full amount of the Hawkins Field overcharges, together with interest from the date of overcharge, the monies to be deposited into an escrow account, held in trust by the Department of Energy, to be disbursed in accordance with the procedures set forth in Section 155 of Pub.L. No. 97-377, 96 Stat. 1830, 1919 (1982).
>
> "In formulating its order, the court in no way relies on Section 155 as an express statutory grant of authority to this court, but acts instead in the exercise of its broad equitable powers to order restitution.[59]
>
> (Footnote) "[59] Accordingly, the escrow fund established pursuant to this court's order shall of course not be subject to the provisions of subsection (e)(1) of Section 155 which limit the monies the Secretary of Energy may disburse to $200 million—received in settlements, not pursuant to judicial order—and which require a finding that the funds to be disbursed 'are not likely to be required for satisfying claims of potential claimants...' and that 'the use [of funds] under this section would be consistent with the remedial order or consent order covering such funds.' Section

> 155 shall otherwise apply in its entirety under this court's order as the set of terms and conditions governing DOE's handling of the escrow account established to receive restitution payments from Exxon.
>
> However, Section 155 clearly bespeaks the intent of Congress that violators of the petroleum price regulations should be made to disgorge their illgotten gains even in situations, like the case before the court, where the victims of the petroleum overcharges cannot be identified. The colossal scale of Exxon's wrongdoing, and the workings of pervasive regulations to spread the burden of that wrongdoing impossibly far and wide, must not deter this court from fashioning an appropriate equitable remedy. The purpose of the domestic petroleum price regulations was to keep oil prices down, to relieve consumers of some of the burden of towering oil costs. The five energy conservation programs identified in Section 155 operate across the nation to reduce that same burden, either by reducing overall consumption through conservation or by direct financial assistance to those most in need. Although one might speculate as to alternative remedies, this court respects the wisdom of the solution chosen by Congress and shall adopt it as the most appropriate equitable remedy in the circumstances of this case."

As quoted above, the District Court stated that P. L. 97-377, § 155 was not followed as an express statutory grant of authority. That lack of authority is very clear from § 155 and its legislative history, for the following reasons:

> 1. Under § 155, the funds to be distributed must be "likely not to be. . .refunded to injured persons because the purchasers of the refined petroleum

products cannot be reasonably identified or paid or because the amount of each purchaser's overcharge is too small to be capable of reasonable determination." Section 155 (a)(2), 96 Stat. 1919. The District Court did not make any attempt by any sort of equitable judicial restitution proceedings to refund the amounts overcharged by Exxon to injured parties. Therefore the District Court could not properly order all of Exxon's overcharges be restored through § 155, even if the Warner Amendment could be applied by analogy, a question this dissent asserts need not be decided on these appeals.

2. Section 155 limited the amounts to be disbursed to $200,000,000. Section 155 (e)(1), 96 Stat. 1919. Exxon's overcharges, with interest, which the District Court properly found subject to restitution, far exceed that amount, even if any prior funds distributed under § 155 are ignored.

3. The funds to be distributed in § 155 were to come from *settlements* of alleged petroleum pricing and allocation violations, rather than from adjudications of a Court as in this case.

4. According to the legislative history of § 155, the statute was to establish "a *one-time* distribution of $200,000,000 to states. . . ." House of Representatives Conference Report No. 97-980 at page 198 (emphasis added). Representative John D. Dingell emphasized these limits as follows:

> "The provision is a one-time provision. It should not be viewed as a precedent. It does not confer on DOE any new restitutional or remedial authority or imply that the DOE has such authority. It is a very limited provision aimed at helping people. It is, I stress, an exclusive, one-time disbursement

authority." 128 Congressional Record H10435 (December 20, 1982).

The District Court seeks to avoid the above limits of § 155 by relying on its "broad equitable powers" but its equitable powers cannot bypass but must recognize the legal rights to restitution that exist in parties harmed by Exxon's overcharges. Section 155 provided for the rights of potential claimants by expressly requiring funds to be used which "are not likely to be required for satisfying claims. . . ." Section 155 (e)(1)(A), 96 Stat. 1919. In the discussion of the "Warner Amendment." Senator J. Johnston, Jr., made the following statements:

> "What we have involved here is a fund collected from those who overcharged but where the consumers cannot be identified, and that is the fund involved and no other money.
>
> "If it were involved with those who could be identified then indeed they should receive the money and *they would have a vested right to receive that money.*
>
> "That money is not involved here but rather money from consumers who cannot be identified." 128 Congressional Record S15126 (December 16, 1982) (emphasis added).

The fact that Congress chose to distribute a certain amount of money through § 155 should not be decisively significant in the exercise of a court's equitable power to make restitution for the following reasons:

> 1. Congress showed no intention of making more than one distribution under § 155, although it could have done so.
>
> 2. Congress limited the amount to be distributed to $200,000,000 although it could have chosen a higher amount.

3. Portions of the legislative history indicate that an important motivation for the introduction of what became § 155 was the desire to ease the burden on the poor of rapidly increasing energy prices. Senator John W. Warner stated:

> "I am convinced that this amendment is the best way to get these funds into the hands of Americans suffering from rapidly escalating energy prices during this frigid winter season." 128 Congressional Record S15116 (December 16, 1982).

V

Entitlements Program, Restitution Issues and DOE Actions

The old oil Entitlements Program was fully operative during the control of prices and allocation of crude oil under the EPAA and the EPCA, and the Entitlements Program necessarily affected the issues to be resolved in restitution proceedings in the District Court for reasons which follow.[14] The Entitlements Program was estab-

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[14]See the Application for Limited Intervention filed April 29, 1983 (R. Index) in the District Court by the Intervenor-Appellants Gladieux Refinery, Inc. (Gladieux) and U. S. Oil and Refining Company (U. S. Oil) as members of the "Consumers Power Group" in which they stated, among other things, the following:

> "1. Each member of the Consumers Power Group was a participant in the Old Oil Entitlement Program prior to the decontrol of crude oil in January 1981.
>
> "2. This Court, in its Memorandum Opinion of March 25, 1983, found defendant, Exxon, liable for price overcharges (including interest) resulting from miscertification of crude oil at its Hawkins Field Unit, in an amount close to $1.5 billion.
>
> "3. If a final determination with respect to this overcharge had been made prior to January 27, 1981, this substantial amount would automatically have been paid to all participants in the Entitlements Program. Those regulations no longer expressly require participants in the Entitlements Program to recertify their reported crude oil receipts to correct

lished by regulation of the predecessor of the DOE which prescribed its operation, including obligations and benefits. 10 C.F.R. § 211.67 (1974). The Entitlements Program was continued until decontrol on January 28, 1981, by regulation 10 C.F.R. § 211.67, as amended from time to time.

A good brief description of the Entitlements Program, and its purposes, by Judge Estes of this Court, is found in the opinion in *Pasco, Inc. v. Federal Energy Administration (Pasco),* (TECA 1975) 525 F.2d 1391, as follows:

> "To minimize the inflationary impact of worldwide oil prices and at the same time to provide an incentive for increased domestic production of crude oil, the 'two-tier' pricing system for crude oil was promulgated. The 'two-tier' pricing system basically imposes a ceiling price of approximately $5.25 per barrel on all 'old' oil and allows new and released oil to be sold without respect to the ceiling price, i.e., at approximately $11.28 per barrel. The FEA found, however, that while the 'two-tier' system met certain necessary objectives, the great disparity between the price of controlled and uncontrolled crude oil was having an unequal impact on all refiners. During the base period of May, 1973, composite crude oil costs of all refiners were approximately equal; however, with the pricing system in effect, the major integrated oil companies, who as a class had far greater

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for overcharges. Consequently, no automatic mechanism for restitution of these overcharges to Entitlement Program participants now exists.

"4. No party is before this Court to represent the interests of Entitlements Program recipients during the relevant period.

"5. The Consumers Power Group are, therefore, entitled to intervene in this action as a matter of right, pursuant to Rule 24(a) of the Federal Rules of Civil Procedure. In the alternative, this Court should grant the Consumers Power Group permission to intervene pursuant to Rule 24(b)." (R. 38468-9, duplicated at R. 38471-2.)

access to old oil, had significantly lower composite crude oil costs in refining their products than did the small and independent refiners.

"To insure that all refiners and marketers shared equally in the benefits of price-controlled crude oil and the burdens of uncontrolled crude oil, the FEA adopted the Entitlements program. Under this program, a refiner must have one 'entitlement' for each barrel of old oil it refines during a particular month. All refiners are initially issued for each month an amount of entitlements equal to their proportionate share of the old oil refined during the month on a nation-wide basis. Thus, a refiner running more old oil as a percentage of its total refinery runs than the national average would have to buy additional entitlements from a refiner which ran a smaller percentage of old oil during the month than the national average. The national ratio of old oil runs to total refinery runs is lowered somewhat by the issuance of additional entitlements to small refiners under the 'small refiner bias' built into the regulation and to certain eligible firms which import residual fuel oil and home heating oil. By requiring refiners and importers who sell entitlements to reduce their crude oil or product costs by the amount of the entitlement sales proceeds, and allowing a purchaser of entitlements to include the cost of entitlements in its crude oil costs, the FEA basically equalized the average weighted crude oil costs of all refiners, thereby eliminating the inequities caused by the 'two-tier' pricing system." (Footnotes omitted.) *Pasco, supra,* 525 F.2d at 1394-1395.

After decontrol, as before decontrol, the DOE has been legally obliged to calculate and collect the obligations, and pay the benefits of the Entitlement Program accrued

during control.[15] The decontrol by the Executive in January 1981 under the provisions of the EPCA in 1975 seemed to contemplate that the DOE, as successor to the FEA, would continue its quasi-judicial actions to proceed, as before decontrol, to order refunds (make restitution) of illegal overcharges such as by Subpart V (10 C.F.R. §§ 205.280 through 205.288) and adjustments in the Entitlements Program, to those damaged by the overcharges. For this purpose, there was enacted in 1975 § 6401 of Title 42 U.S.C., (§ 531 of Pub.L. 94-163, Title V) which provides as follows:

> "§ 6401. Expiration of authority
>
> "Except as otherwise provided in subchapter I or subchapter II of this chapter, all authority under any provision of subchapter I or subchapter II of this chapter and any rule, regulation, or order issued pursuant to such authority, shall expire at midnight, June 30, 1985, but such expiration shall not affect any action or pending proceedings, civil or criminal, not finally determined on such date, nor any action or proceeding based upon any act committed prior to midnight, June 30, 1985."

The current status of administrative proceedings and actions by DOE to determine these obligations and benefits are not clear and should be determined by the District

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[15]For example, in *Ashland Oil, Inc. v. DOE (Ashland)*, (TECA 1985) 760 F.2d 298, this Court affirmed the dismissal of Ashland's suit under ESA §§ 209 and 210 to overturn or modify a settlement between DOE and Cotton Petroleum Company. This Court stated that:

> "There has been no factual inquiry as to who was injured by Cotton's overcharges. Instead, one of the purposes of the pending Subpart V proceeding is to make precisely that determination." *Ashland, supra*, 760 F.2d at 301.

In the Subpart V proceedings the Office of Hearings and Appeals "explicitly proposed to permit such refiners [as Ashland] to submit claims in the refund procedure and demonstrate their injury." *Ashland, supra*, 760 F.2d at 300.

Court on notice and hearing. It is known that the DOE began to perform its obligations after decontrol by prescribing in detail the manner and timing of final adjustment of the Entitlements Program in 10 C.F.R. § 211.69 designated as "Entitlements Adjustment Mechanism," adopted July 13, 1981 and amended thereafter. The purpose of this § 211.69 was stated in paragraph (b) thereof to be "a method for an orderly termination of the domestic crude oil entitlements program established in § 211.67." The probability that claims would be allowed in administrative or judicial proceedings was recognized in the definition of "claim" in paragraph (c) of § 211.69 as follows:

> " 'Claim' means the dollar amount determined by ERA to be owed to a firm resulting from adjustments, amendments or other modifications to any one or more Entitlements Notices issued by ERA pursuant to § 211.67 for the period from October 1, 1980, through January 27, 1981, *or resulting from an administrative or judicial determination.*" (Emphasis added.)

The effect on the obligations of Exxon to the DOE as administrator of the Entitlements Program, and to the potential or certified beneficiaries of the Entitlements Program was not determined by the District Court. It is possible that claimants under the Entitlements Program in addition to the applicants for intervention in the District Court might appear if given the opportunity and might prove their claims to restitution. It is established that applicants for intervention Gladieux and U. S. Oil sought the right to do so for themselves and others.

The performance by DOE of its obligations to administer the lawful orderly termination of the Entitlements Program could not be judicially assumed without a hearing of interested parties, and might be disproved. See

Navajo Refining Company v. United States Department of Energy, (TECA 1984) 750 F.2d 966.

After the final judgment of the District Court on June 7, 1983, the DOE made some formal "final" and tentative decisions in 1984 and 1985 concerning the Entitlements Program. Nevertheless because these actions of the DOE are relevant to future judicial restitution proceedings, and may be judicially noticed by this Court, it is noted that the DOE on June 28, 1984, through the Economic Regulatory Administration (ERA) issued a "Notice of final decision; notice of public proceeding and public hearing" entitled "January 1981 and Entitlement Adjustment Notices." This document was published in 49 Federal Register (F.R.), Number 129 of July 3, 1984 at pages 27410-27420. The final decision was the decision not to issue the January 1981 and Final Entitlements Adjustment Lists. 49 F.R. *supra* at 27413. The tentative decision dealt with "Outstanding Exception Orders." 49 F.R. *supra* at 27418-27420. In this document described above, the final decision was supported by a relatively long recitation of history, administrative determinations of fact, notice of discretionary action and related matters concerning the subject matter. 49 F.R. *supra* at 27410-27418. No determination of the validity of any part thereof is in order since the document was not before the District Court.

Also, on January 9, 1985 the ERA, for DOE, filed a "Final Decision" published in 50 Federal Register, No. 9, 1919-1925 of January 14, 1985, summarized therein as follows:

> "The Economic Regulatory Administration (ERA) of the Department of Energy (DOE) is announcing the final decision concerning the Department's policy on Entitlements exception orders. If the Office of Hearings and Appeals (OHA) determines that refin-

> ers as a class were injured by overcharge activity, OHA will fund receive orders from that portion of refund money which corresponds to the injury sustained by refiners as a class. Dispense orders will not be effectuated." 50 F.R. at 1919.

The validity of any part of these, or any other administrative actions that may exist, is not discussed except to note that any material part of such document that is invalid under the Administrative Procedure Act (APA) or other statute, the United States Constitution, or historic equitable principles is ineffective.

It seems clear that the miscertification of crude oil as upper tier oil during control, and collection of wrongfully charged prices may have had some effect on the rights of others under the Entitlements Program, and that the resulting damages of the victims of overcharges might be satisfactorily shown in fact and amount. At least the contrary should not be assumed on judicial notice without notice and hearing, for reasons stated above.

VI

Statutory Duties And Powers Of The Comptroller General

The Comptroller General of the United States is and was obligated and empowered to monitor the operations of the DOE (and its predecessors) by Title 42 U.S.C. Section 7137 which provides as follows:

> "The functions of the Comptroller General of the United States under Section 12 of the Federal Energy Administration Act of 1974 [15 USCS § 771] shall apply with respect to the monitoring and evaluation of all functions and activities of the Department under this Act [Department of Energy Organization Act, P. L. 95-91] or any other Act

administered by the Department. (Aug. 4, 1977, P. L. 95-91, Title II, § 207, 91 Stat. 574.)"

Title 15 U.S.C. Section 771 referred to in the paragraph quoted immediately above states in part the following:

"(a) Scope of activities; monitoring activity; data to Comptroller General from Administration; reports and recommendations to Congress. For the duration of this Act, the Comptroller General of the United States shall monitor and evaluate the operations of the Administration including its reporting activities. The Comptroller General shall (1) conduct studies of existing statutes and regulations governing the Administration's programs; (2) review the policies and practices of the Administration; (3) review and evaluate the procedures followed by the Administrator in gathering, analyzing, and interpreting energy statistics, data, and information related to the management and conservation of energy, including but not limited to data related to energy costs, supply, demand, industry structure, and environmental impacts; and (4) evaluate particular projects or programs. The Comptroller General shall have access to such data within the possession or control of the Administration from any public or private source whatever, notwithstanding the provisions of any other law, as are necessary to carry out his responsibilities under this Act and shall report to the Congress at such times as he deems appropriate with respect to the Administration's programs, including his recommendations for modifications in existing laws, regulations, procedures, and practices."

Critical Opinions of the Comptroller General Since Decontrol on Duty to Attempt to Order Restitution of Illegal Overcharges

In the performance of these statutory duties and powers the Comptroller General has repeatedly and formally advised DOE that it has exceeded its statutory power to collect and to dispose of funds collected in consent order settlements of monetary claims for alleged violations of petroleum price and allocation regulations by depositing funds in the Treasury, or otherwise disposing of them, without prior efforts to make restitution to victims of the overcharges. The first instance of judicial notice by this Court of the actions of the Comptroller General in so advising DOE was made in *Department of Energy v. Hunt,* (TECA 1984) 734 F.2d 816 at 824.

The Comptroller General has recently made a comprehensive report to the House of Representatives of the United States through the Subcommittee on Oversight and Investigations and the Committee on Energy and Commerce which in part, in Chapter 3 on the subject of restitution of illegal overcharges, states:

"CHAPTER 3

DOE NEEDS TO ENSURE THAT OIL OVERCHARGE DISTRIBUTIONS RESULT IN RESTITUTION TO INJURED PARTIES

"When parties injured by oil companies' overcharges are not readily identifiable, ERA is required by DOE's regulations to refer these cases to OHA, which is responsible for allowing potentially harmed parties to file a claim for a refund. If funds remain after all eligible claims are made, OHA can make payments to states. ERA, however, has bypassed OHA and has issued four consent orders that

provide for oil companies to make direct payments to states without prior efforts to identify those overcharged and the amount of the overcharges. ERA did refer six other cases to OHA as required by DOE's regulations.

"In these consent orders, ERA has agreed to several types of distributions as settlement of the oil companies' alleged violations. Some of the orders have involved payments to institutions, such as state governments, that were not actually injured by the overcharges. The decision by the Comptroller General of the United States (62 Comp. Gen. 379 (1983)) concluded that ERA was in these cases improperly using the consent orders by making, or allowing the oil companies to make, distribution of overcharge refunds without prior efforts to identify those overcharged and the amount of the overcharges.

"DOE maintains that its regulations are not mandatory and that it has the authority to take such actions. As discussed in this chapter, we disagree and believe that DOE should follow its mandatory regulations and assure that the injured parties receive the benefit of the oil overcharge distributions.

"The following illustration shows, as of July 18, 1984, the four ERA consent orders and six OHA decisions and orders which resulted in payments to states. (The illustration in appendix II shows the payments that the eight states had received as of July 18, 1984, as a result of these orders and decisions. As discussed on page 6, we did not review the Virgin Islands' use of funds received as a result of individual oil company consent orders.)

"Illustration 3
ERA Consent Orders and OHA Decisions and Orders
Which Resulted in Payments to States
as of July 18, 1984[a]

"Company distributions ordered by ERA	Authorized uses of the funds	Amount[b]
Chevron	—Highways and bridge maintenance and repair —Ridesharing (i.e. vanpool and carpool) programs —Public transportation projects —Residential or commercial building energy audits —Grant or loan programs for weatherization or other energy conservation equipment installation —Energy assistance programs —Airport maintenance or improvement —Reduction in airport user fees —Energy conservation or energy research offices and administration	$25,000,000
Standard Oil Company (Ohio)	Although DOE encouraged the states to use the funds for energy-related projects, DOE intended to provide maximum flexibility to the states in determining appropriate uses of the funds	10,000,000

"Company distributions ordered by ERA	Authorized uses of the funds	Amount[b]
Imperial Refineries Corporation	—Same as Sohio	600,000
Site Oil Company of Missouri and Flash Oil Corporation (Site and Flash)	—Energy-related purposes	450,000
Total ERA-approved distributions		$36,050,000
"Distributions		
Palo Pinto Oil and Gas	—Energy-related plans	266,904
PVM Oil Associates, Inc.	—Projects to benefit heating-oil customers in New York City	67,961
Worldwide Energy Corporation	—Projects to benefit natural gas liquids users in Oklahoma and Texas	49,400
Armstrong and Associates	—Projects to benefit parties injured by overcharges (Tex.)	9,863
Standard Oil Company (Indiana)	—Projects to benefit class of persons injured by the overcharges—consumers of motor gasoline and middle distillates	24,000,000
Belridge Oil Company	—Projects to benefit those citizens most likely affected by overcharges	95,821
Total OHA-ordered distributions		24,489,949
Total		$60,539,949

[a]"Does not include payments to any state which, as a customer of the oil companies whose alleged violations were settled by terms of a consent order, qualified for a refund as a purchaser of petroleum products.

[b]"Amounts shown are the payments to the states specified in ERA's consent orders and OHA's decisions and orders and do not include any interest which DOE may have required the companies to pay.

"ERA-ORDERED DISTRIBUTIONS MAY NOT RESULT IN RESTITUTION TO INJURED PARTIES

"The first four companies listed in the illustration are those which ERA ordered to make payments totaling $36 million to the states to settle alleged overcharges. The requirement for those payments was contained in the consent orders ERA and the companies signed in settling the companies' alleged overcharges. We believe that ERA has improperly used these consent orders because the payments were made without giving overcharged customers an opportunity to present their claims through DOE's established procedures. Also, the authorized uses of the funds were so general that there was little assurance that the funds would be used for restitutionary purposes.

"DOE's regulations (10 C.F.R. Part 205, Subpart V), promulgated pursuant to the Emergency Petroleum Allocation Act of 1973, establish procedures for distributing oil overcharge refunds when those overcharged and the amounts of the overcharges cannot be readily identified. These procedures are designed to protect the rights of overcharged consumers and rquire ERA to refer overcharge cases to OHA when ERA cannot readily identify the parties injured by the oil companies' overcharges. OHA then is responsible for obtaining public comments on its proposed method of making refunds and allowing potentially injured parties to file a claim for a refund. These procedures were followed for the last six companies listed in the illustration.

"ERA bypassed these procedures for the first four companies listed in the illustration. The consent orders for those companies did not present poten-

tially injured parties an oppportunity to file claims. Rather, payments went directly to the states without prior efforts to identify those overcharged and the amounts of overcharges.

"We have previously brought this matter to DOE's attention in two opinions and two decisions of the Comptroller General of the United States.[1] (Footnote 1, Comptroller General of the United States Opinions B-200170 Apr. 1, 1981, and 60 Comp. Gen. 15 (1980); and Decisions 62 Comp. Gen. 379 (1983) and 63 Comp. Gen. 189 (1984).) In these two documents, we said that DOE is legally bound to follow its own regulations, which require that the administrative procedures dicussed above be followed in determining appropriate restitutionary distribution mechanisms. Consequently, we have concluded that DOE does not have the authority to avoid its subpart V regulations by agreeing to consent order provisions that distribute funds directly, without prior efforts to locate injured parties.

"DOE has maintained that it has the authority under the Emergency Petroleum Allocation Act of 1973 to take any action neccssary to eliminate or compensate for the effects of a violation of its petroleum pricing and allocation regulations. In its May 25, 1984, *Federal Register* ruling, DOE said that it is not required by its regulations or statute to use the administrative procedures. Rather, DOE asserts that it has the authority to employ various forms of indirect restititution, including refunds to the miscellaneous receipts of the U.S. Treasury and payments to state governments.

"Based on our research of the applicable court decisions,[2] (Footnote 2, See 62 Comp. Gen. 379, 382-383, 386-387 (1983).) we believe DOE's authority is

limited to making refunds to overcharged customers and to those likely to have been injured by the overcharges. We also believe that DOE has not been expressly granted any authority to promote the interests of consumers in general through direct payments to them or through grants made on their behalf to states or other entities. Therefore, we believe DOE did not have the authority to agree to consent order provisions such as the four discussed above.

"In addition to not following the subpart V procedures for these four cases, ERA has agreed to settlement terms which may not provide for restitution to injured parties. As shown in the illustration on page 22, the states can use these four settlement distributions for purposes such as highway and bridge maintenance and repair, airport maintenance or improvement, energy conservation or energy research offices and administration, and energy-related projects. Based on our review of these four consent orders and the *Federal Register* notices announcing them, we did not find any provisions therein which would enable ERA to ensure that these refunds would result in direct restitution to injured parties.

"Even though a state may be complying with the provisions of the consent order, it might not be using the funds for restitutionary purposes. For example, Pennsylvania funded basic and applied research on energy use, New York funded its state energy office, and Georgia funded airport improvement projects. Texas, which as of July 18, 1984, had received $798,858 as a result of four consent orders (Chevron, Standard Oil (Ohio), Site and Flash, and Armstrong and Associates[3]) (Footnote 3, The Armstrong and Associates consent order accounted for only $14,232

($9,863 refund plus $4,369 of interest) of the $798,858 and was the only one of these four which OHA handled, under DOE's subpart V procedures. As discussed in the next section, OHA usually approves states plans before disbursing the refunds. Because the Armstrong and Associates case involved only a small amount of funds, OHA did not require such approval in this case.) appropriated these funds to its Bureau of Economic Geology, University of Texas at Austin. The Deputy Director of the Bureau told us that they plan to use the funds for the following two research projects:

—identifying, classifying, and researching methods to enhance the recovery potential of existing Texas oil reservoirs and

—identifying and classifying Texas' lignite deposits and researching the economic recovery factors which would make exploration feasible.

"In our opinion, these two projects would directly benefit energy producers. Energy consumers would only indirectly benefit, and then only if the research resulted in the production of sufficient additional oil and/or lignite to help stabilize consumer prices of products produced from these resources.

"OHA'S PROCEDURES FOR ENSURING THAT STATES PROPERLY USE OIL OVERCHARGE DISTRIBUTIONS

"Although OHA ensures that states properly use the distributions which it orders, prior to March 1984 it had not ensured that the states were using the interest earned on these distributions in accordance with OHA-approved state plans. After we brought this matter to OHA's attention in March 1984, it

began to require the states to use such interest in accordance with state plans.

"For five of the six OHA-ordered distributions, OHA required the states to have their planned uses of the funds approved by OHA before the states received the funds. Also, for these five cases the states are required to submit a follow-on report to OHA on how they have used the funds.

"For the sixth case, Armstrong and Associates, OHA did not require either an approved plan or a follow-on report. OHA decided that in view of the small amount of funds ($9,863), it would not be cost effective to require the state to channel these funds to specific segments of the population who were most affected by the overcharges. Rather, OHA decided to deposit the $9,863 in Texas' escrow account established to hold such funds pending the state legislature's approval of how the funds would be used.

"We discussed this case with an OHA official, particularly because, in the Worldwide Energy Corporation case ($49,400 in May 1983), OHA required a plan and follow-on report from Oklahoma even though its share was only $8,828. The OHA official said that Armstrong and Associates was the first of these distributions (Jan. 1983) to the states. Since that time, OHA has been requiring a plan and follow-on report irrespective of the amount of the refund.

"Although OHA monitored five of the six refunds to the states, prior to March 1984 it did not monitor the states' use of the interest earned after they received these refunds. Of the eight states we visited, four (California, Georgia, Pennsylvania, and Texas) were using the interest they had earned on both the ERA-ordered and OHA-ordered distributions for

general purposes, rather than for the same purposes as the refunds themselves. Arizona and New York were appropriately using their earned interest for the same purposes as their refunds. Florida officials had not yet decided how to use the interest and Louisiana officials could not provide adequate documentation on how they have used or will use their interest.

"After our discussion with an OHA official in March 1984, OHA began requiring states to use the interest earned on these refunds in accordance with the OHA-approved state plans. We agree with this requirement because we believe that the states' use of the interest earned as a result of these oil overcharge refunds should be monitored and controlled by DOE.

"CONCLUSIONS

"Under DOE's subpart V procedures, ERA is supposed to refer oil overcharge cases for which it is difficult to readily identify the injured parties to OHA for resolution. ERA, however, has not followed these procedures in all cases. As a result, the ERA-approved distributions of oil overcharge funds to the states may not have resulted in restitution to the injured parties. Rather, ERA has approved distributions to the states without ensuring that the distributions are directly related to those who were injured by the overcharges. To provide adequate assurance that the injured parties receive the benefit of the oil overcharge refunds, we reiterate the Comptroller General of the United States' opinions and decisions that the Secretary of Energy comply with DOE's mandatory procedures to identify injured parties."

These recitations are factually supported by records too lengthy to quote, that are judicially noticed, listed in Addendum No. 1, hereof.

The opinions and decisions of the Comptroller General cited in footnotes 1 and 2 of the above quotation are judicially noticeable and should be considered as advisory in determining whether to rely on the DOE to assist in identifying those damaged by illegal overcharges and the amounts thereof. Those opinions and decisions, in part, rely on opinions of this Court on restitution.

Judicial notice has also been taken of the actions since decontrol in discontinuing the monthly publications of the Entitlements Program which served the purposes of restitution of damages resulting from illegal overcharges and implementing the restitutional purposes of exception determinations. See the complaint of *Navajo Oil Co. v. United States Department of Energy,* (TECA 1984) 750 F.2d 966.

Some of the records of the DOE concerning the Entitlements Program since decontrol are listed in Addendum No. 2 hereof.

If a district court finds that the DOE is unable or unwilling to assist in the process of identifying those damaged by the illegal overcharges found to have existed in this or other basic litigation, then other means including, if necessary, reference to a special master or special masters should be considered.

VII

Power of District Court to Tax Costs of Making Restitution

It is obvious that in restitution proceedings in equity the usual costs may be allowed by a district court to the prevailing party under Rule 54(d) F.R.Civ.P. against the party other than the United States, adjudged to have violated the statutes or regulations, or both. Because restitution proceedings may require additional costs and

expenses in special circumstances a district court has the power to assess additional costs. *Brashear Freight, supra,* 312 U.S. 621 at 629, 61 S.Ct. 784 at 788, 85 L.Ed. 1883 at 1088 (1941); 10 Wright, Miller & Kane, *Federal Practice and Procedure* § 2668; 6 *Moore's Federal Practice,* Second Edition, ¶ 54.77[1] at 1702.

If a district court finds it necessary or desirable under the exceptional circumstances to appoint a special master to conduct proceedings on all or some of the issues in the restitution proceedings, subject to judicial order of the district court the appointment and taxation of the additional cost and expenses, including compensation of the master, is authorized by Rule 53 F.R.Civ.P. 10 Wright, Miller & Kane, *Federal Practice and Procedure* § 2670; 6 *Moore's Federal Practice,* Second Edition, ¶ 54.77[3].

Conclusions

For the foregoing reasons, the judgment of the District Court on the basic issues of the violations of the statutes and regulations, including misclassification of crude oil by Exxon and allowance of interest are properly affirmed. The detailed findings of fact and conclusions of law of the District Court on the basic issues supporting its judgment on the illegal overcharges and the amount thereof are sound and represent judicial performance of complex and difficult tasks in keeping with the best traditions of the judiciary of the United States.

The action of the District Court in ordering the entire amount of the overcharges and interest paid to the Treasury of the United States for disposition analogous to that provided in the Warner Amendment, § 155 of P. L. 97-377 should be reversed, and the issues of restitution of damages to those injured by the illegal overcharges should be remanded to the District Court for further

proceedings in accordance with the controlling equitable, constitutional and statutory principles discussed herein.

ADDENDUM No. 1

Summary of Some Principal Administrative Decisions, Opinions and Orders Relevant to Restitution of Excessive Charges Under EPAA and EPCA (1977 to Present)

I.

Relevant Published Decisions and Published and Unpublished Opinions of the Comptroller General (CG) on Powers and Duties of the Department of Energy (DOE) Concerning Restitution of Overcharges under the EPAA and EPCA.

A. Published Decision by Special Assistant to CG in 63 Comp. Gen. 189 (1984), cited in *Department of Energy v. Hunt,* (TECA 1984) 734 F.2d 816 at 824;

B. Unpublished opinion of General Counsel (CG) directed to Theodore J. Garrish, General Counsel, DOE, B-210176 (October 4, 1984).

C. Unpublished opinion by Special Assistant to CG directed to John Paul Hodel, Secretary of Energy, B-210176 (October 4, 1984).

D. Published decision by Special Assistant to CG in 62 Comp. Gen. 379 (1983).

E. Unpublished opinion No. B-200170 (April 1, 1981).

F. Published opinion of CG in 60 Comp. Gen. 15 (1980).

II.

Final Decisions, Rulings and Notices about Refund Procedures of DOE, Economic Regulatory Administration (ERA) or Office of Hearings and Appeals (OHA) (one or more of them) 1983-1985.

A. Recent Notices of Implementation of Special Refund Procedures (February 1985):

1. Notice of Implementation of Special Refund Procedures, 50 F.R. 6244 (February 14, 1985).

2. Notice of Implementation of Special Refund Procedures and Solicitation of Comments, 50 F.R. 6240 (February 14, 1985).

3. Notice of Implementation of Special Refund Procedures, 50 F.R. 5307 (February 7, 1985).

4. Notice of Implementation of Special Refund Procedures, 50 F.R. 5305 (February 7, 1985).

5. Notice of Implementation of Special Refund Procedures, 50 F.R. 4785 (February 1, 1985).

6. Notice of Implementation of Special Refund Procedures, 50 F.R. 4774 (February 1, 1985).

7. Notice of Implementation of Special Refund Procedures, 50 F.R. 4766 (February 1, 1985).

8. Notice of Implementation of Second Stage Refund Procedures, 50 F.R. 4763 (February 1, 1985).

9. Notice of Implementation of Special Refund Procedures, 50 F.R. 4757 (February 1, 1985).

10. Notice of Implementation of Special Refund Procedures, 50 F.R. 4749 (February 1, 1985).

11. Notice of Implementation of Special Refund Procedures and Solicitation of Comments, 50 F.R. 4739 (February 1, 1985).

B. Noteworthy Final Decisions, Rulings and Notices about Refund Procedures:

1. Final Decision, 50 F.R. 1919 (January 14, 1985).

2. Notice of Final Decision; Notice of Public Proceedings and Public Hearing, 49 F.R. 27410 (July 3, 1984).

3. Ruling, 49 F.R. 22063 (May 25, 1984).

4. Notice of Issuance of Proposed Decision and Order for the Implementation of Special Refund Procedures, 49 F.R. 6542 (February 22, 1984).

5. Notice of Implementation of Special Refund Procedures and Solicitation of Comments, 49 F.R. 3125 (January 25, 1984).

6. Notice of Implementation of Special Refund Procedures and Solicitation of Comments, 48 F.R. 57608 (December 30, 1983).

7. Notice of Action Taken on Consent Order, 48 F.R. 28536 (June 22, 1983).

III.

Delegation Orders to OHA or ERA to Take Action or to Establish Policy of DOE, Issued by DOE.

A. Delegation Order No. 0204-4 (1977), quoted at 10 C.F.R. Part 1001, Appendix (1984).

B. Delegation Order No. 0204-24 (March 30, 1978).

C. Delegation Order No. 0204-24, Amendment No. 1 (May 5, 1980).

D. Delegation Order No. 0204-114 (December 20, 1984).

IV.

Ruling of Office of General Counsel of the DOE of May 22, 1984 "to clarify the scope of its remedial authority under the Emergency Petroleum Allocation Act, 15 U.S.C. 751 *et seq.*, and to address certain opinions that the Comptroller General of the United States has offered on the subject." This ruling was published in full in 49 F.R. pages 22063-22068, May 25, 1984, for the following express purposes: "Title 10 of the Code of Federal Regulations is hereby amended by adding Ruling 1984-1 to the Appendix to subchapter A to read as follows: . . . ." 49 F.R. 22063.

ADDENDUM NO. 2

Some Records of the DOE Concerning the Entitlements Program Since Decontrol Including a Regulation and "Final Decisions."

Regulation 10 C.F.R. § 211.69 *Entitlements Adjustment Mechanism,* as amended at 46 F.R. 43654, August 31, 1981; 46 F.R. 63209, December 31, 1981.

"Final Decision" of Economic Regulatory Administration (ERA) "not to issue the January 1981 and Final Entitlements Adjustments lists ('lists') thereby ending the Entitlements Program" and "intent to receive additional comments on the most appropriate manner to handle outstanding exception orders. DOE's tentative decision is not to give effect to the entitlements exception orders, but to consider potential mechanisms which would effectuate those orders under which firms would have received money." This order includes parts entitled: "I. The History of the Entitlements Program."; "II. The Decontrol Order and Subsequent Events Affecting the Issuance of Any Further Entitlements Lists."; "III. Decision."; "IV. Analysis of Public Comments."; "V. Treatment of Outstanding Exception Orders — Tentative Decisions."; "VI. Comments Requested."; "VII. Public Comment Procedures." "VIII. Procedural Matters." 49 F.R. No. 129, 27410, July 3, 1984.

"Final Decision" of ERA of DOE "concerning the Department's policy on Entitlements exception orders. If the Office of Hearings and Appeals (OHA) determines that refiners as a class were injured by the overcharge activity, OHA will fund receive orders from that portion of refund money which corresponds to the injury sustained by refiners as a class. Dispense orders will not be effectuated." 50 F.R. No. 9, 1919, January 14, 1985. This decision includes parts entitled: "I. Introduction"; "II.

Decision"; "III. Discussion of Comments"; and "IV. Procedural Matters." In part III, among other things, it is stated:

> "One commenter questioned the extent to which the Citronelle exception order would be affected by this proceeding. The Citronelle order was an exception relating to the Tertiary Incentive Program and the certification regulations. Issues related to the Citronelle order are being adjudicated before DOE and the Courts." 50 F.R. at 1925.

APPENDIX B-1

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

Nos. DC-91 through DC-100
(consolidated)

(DISTRICT COURT NO. 78-1035)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
AND
STATES OF ALABAMA, ARKANSAS, CALIFORNIA, *et al.*,
Intervenors-Appellees,
v.
EXXON CORPORATION,
Defendant-Appellant (No. DC-93)
NATIONAL OIL JOBBERS COUNCIL and the JOBBERS GROUP,
Intervenors-Appellants (No. DC-91)
GLADIEUX REFINERY, INC., and U.S. OIL AND REFINING COMPANY,
Intervenors-Appellants (No. DC-92)
INDICATED REFINERS, Champlin Petroleum Company,
Ashland Oil, Inc., Tenneco Oil Company,
American Independent Refiners Association,
Pennzoil Company, and Texas City Refining, Inc.,
Intervenors-Appellants (No. DC-94)
GASOLINE RETAILERS, Luther Griffin,
t/a Palmer Highway Exxon,
Edward McGovern, t/a Maple Avenue Exxon,
Anthony Monaco,
t/a Milltown Exxon Servicecenter, Inc.,
Donald E. Skilling,
t/a Edon Service Corp., Tex Shipley,
t/a Shipley's Standard Service,
Intervenors-Appellants (No. DC-95)

TOSCO CORPORATION,
Intervenor-Appellant (No. DC-96)

PHILADELPHIA ELECTRIC COMPANY,
Intervenor-Appellant (No. DC-97)

AIR TRANSPORT ASSOCIATION OF AMERICA,
Intervenor-Appellant (No. DC-98)

GERALDINE H. SWEENEY, RJG CAB, INC.,
NATIONAL FREIGHT, INC.,
Intervenors-Appellants (No. DC-99)

MARATHON PETROLEUM COMPANY, MOBIL OIL CORPORATION,
and MURPHY OIL CORPORATION,
Intervenors-Appellants (No. DC-100)

Before: BECKER, BROWN and MAXWELL, Judges.

Nos. DC-91 through DC-100
(consolidated)

ORDER DENYING PETITIONS FOR REHEARING AND/OR SUGGESTIONS FOR REHEARING EN BANC

Upon consideration of Appellant's and Intervenors-Appellants' Petitions for Rehearing and/or Suggestions for Rehearing *En Banc*, it is hereby

ORDERED that said Petitions for Rehearing are DENIED.

It is FURTHER ORDERED that the Suggestions for Rehearing *En Banc* are DENIED.

The mandate shall be issued on Thursday, August 22, 1985.

FOR THE COURT:

(SIGNATURE)

Donna M. Bold
Clerk

August 15, 1985

APPENDIX B-2

Nos. DC-91 through DC-100

IN THE
TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

EXXON CORP.
Defendant-Appellant,

THE NATIONAL OIL JOBBERS
COUNCIL AND THE JOBBERS'
GROUP,
Intervenors-Appellants.

ORDER DENYING WITHOUT PREJUDICE MOTION TO PERMIT PARTIES TO FILE A SUPPLEMENTAL BRIEF ON THE SIGNIFICANCE OF THE JUNE 21, 1985 OHA REPORT AND GRANTING LEAVE TO FILE THE REPORT

On June 24, 1985, Intervenors-Appellants National Oil Jobbers Council and the Jobbers' Group filed a motion to permit the parties who wish to do so to file a supplemental brief on the significance of the June 21, 1985 *Report of the Office of Hearings and Appeals of the Department of Energy (Report)* filed in the District Court of Kansas in *In re: The Department of Energy Stripper Well Exemption Litigation*, M.D.L. 378 (D.Kan.).

The motion will be denied without prejudice to the contentions of the movants and other parties on the significance of the *Report.* Leave will be granted to file the

OHA *Report* attached to the subject motion. The *Report* apparently will be printed and available at the OHA public document room and by publication in *Energy Management: Federal Energy Guidelines,* a commercially published loose-leaf reporter system, and perhaps elsewhere.

It is therefore

ORDERED that the subject motion be denied without prejudice. It is further

ORDERED that the *Report* of OHA of June 21, 1985 be filed in the Office of the Clerk of this Court.

FOR THE COURT:

/s/ Donna M. Bold
Donna M. Bold
Clerk

June 27, 1985

APPENDIX C

UNITED STATES of America, *Plaintiff,*
v.
EXXON CORPORATION, *Defendant.*

Civ. A. No. 78-1035.

United States District Court, District of Columbia.

March 25, 1983.

Department of Energy brought suit against operator of unitized oil field for charges in violation of oil-price regulations. Upon cross-motions for summary judgment, the District Court, Flannery, J., held that: (1) application of unit property rule requiring that a unit be considered a single property with a single, aggregated base production control level for purposes of calculating quantities of new, released, stripper and old oil, was valid; (2) producing patterns at Texas oil field had been significantly altered on day field was unitized in January 1975 where operator of field had transferred production allowables among constituent leases and was injecting gas; thus, operator's obligation to calculate a unit-base production control level and to account for oil production at the field on a unit-wide basis accrued on that date under oil price regulations; and (3) sole operator of the unitized oil field would be held responsible for all overcharges at the field, which totaled nearly $900,000,000 and would be required to make payments in amount of overcharges, with interest, into United States Treasury; however, operator would not be required to pay civil penalties.

Government's motion granted in part and denied in part and operator's motion denied.

MEMORANDUM OPINION

FLANNERY, District Judge.

This matter is before the court on cross-motions for summary judgment. Plaintiff Department of Energy ("DOE")[1] alleges that defendant Exxon Corporation ("Exxon") from January 1975 to January 1981 violated federal two-tier oil price-control regulations by selling as higher-priced "new" oil what should properly have been sold as lower-priced "old" oil. DOE alleges Exxon overcharged crude oil purchasers by failing properly to establish a unit-wide base production control level — the basis for calculations of "new" and "old" oil — for the Hawkins Field Unit, which it operates near Hawkins, Texas. DOE asks that Exxon be ordered to pay into the United States Treasury the alleged amount of overcharges — some $895 million — with interest from the date of overcharge, and that Exxon be assessed civil penalties of about $38 million.

In support of its cross-motion for summary judgment, Exxon argues that it is guilty of no overcharge because the rule DOE seeks to enforce against it is invalid as beyond the agency's statutory authority, arbitrarily and capriciously applied, issued without proper procedure, and finally, in any event, not applicable before September 1, 1976. In opposition to DOE's motion, Exxon argues that the regulations at issue, if valid, require the establishment of a unit base production control level only upon

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[1]The DOE, established in 1977 under the Department of Energy Organization Act, 42 U.S.C. § 7101 *et seq.*, has responsibility for the enforcement of federal oil price regulations. It was preceded in this task by the Federal Energy Administration ("FEA"), set up under the Federal Energy Administration Act, formerly 15 U.S.C. § 761 *et seq.*, which was in turn preceded by the Federal Energy Office, ("FEO") created following enactment of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 751 *et seq.* Where appropriate the DOE, FEA and FEO will be referred to interchangeably throughout this Opinion.

the occurrence of a "significant alteration in producing patterns", which occurred at the Hawkins Field no earlier than March 1977 and which, in any event, presents a disputed question of fact which may not be resolved on a motion for summary judgment.

For the reasons expressed below, plaintiff's motion for summary judgment is granted in part and denied in part. Defendant's motion is denied.

I. Background

A. *The Regulatory Framework*

In 1970 Congress passed the Economic Stabilization Act, Pub.L. No. 91-379, 84 Stat.799, as amended 12 U.S.C. § 1904 note, authorizing the President to issue such orders as he felt appropriate in order to stabilize prices. In the summer of 1971 the President imposed wage and price controls and delegated their enforcement to the newly-created Cost of Living Council ("CLC"). During the next few years these controls were gradually phased out, but because prices of petroleum products continued to climb, the CLC in August 1973 promulgated regulations applicable only to the oil industry. 6 C.F.R. Part 150, Subpart L (1974); 38 Fed.Reg. 22,536 (1973).

Just a few months later, after the Arab oil embargo had caused oil prices to jump sharply, Congress in November 1973 passed the Emergency Petroleum Allocation Act ("EPAA"), Pub.L. No. 93-159, 87 Stat. 628, 15 U.S.C. § 751 *et seq.* (1976), requiring the promulgation of regulations within 15 days. EPAA § 4(a). In January 1974, the new Federal Energy Office ("FEO") reissued the CLC price regulations, with only minor changes, at 10 C.F.R. Part 212, Subpart D (1975), 39 Fed.Reg. 1924, 1952 (1974) where they remained until the decontrol of petroleum prices in January 1981.

The heart of the petroleum price regulations was the application to domestically produced crude oil of a two-tier pricing structure designed to further the twin goals of combatting inflation while encouraging new domestic oil production. *Cities Services Co. v. FEA*, 529 F.2d 1016, 1020 (Em.App.1975). Producers were required to sell "old" crude oil at the lower-tier price and were allowed to sell "new" crude oil at a higher price. 10 C.F.R. §§ 272.73, 212.74 (1975).[2] Amounts of "old" and "new" oil were calculated by comparing current production at a given property to that property's production in an earlier corresponding base period, its "base production control level" ("BPCL").[3] Any excess of current production above the BPCL could be sold as higher-priced new oil. All current production up to the BPCL, however, had to be sold as lower-priced old oil.[4]

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[2]Initially the price of new oil was simply not controlled; the regulations allowed it to be sold "without respect to the ceiling [lower-tier] price." 10 C.F.R. § 212.72 (1975). However, in February 1976, in implementing the Congressional directives of Section 401(a) of the Energy Policy and Conservation Act ("EPCA"), Pub.L. No. 94-163, Title IV, 89 Stat. 871, 941 (1975), 15 U.S.C. §§ 757 *et seq.*, the FEA established the upper-tier ceiling price for new oil. 41 Fed.Reg. 4931, 4932 (1976).

[3]The initial base period was calendar year 1972. 10 C.F.R. § 212.72 (1975). The FEA recognized, however, that as production at older fields declined naturally, it became increasingly difficult for producers to boost production above 1972 levels, and the lure of higher new oil prices no longer served as a realistic incentive to increased production. 41Fed.Reg.4931, 4932-33 (1976). Consequently, in February 1976 the FEA amended the regulations to provide producers with a choice. For production after February 1, 1976, producers could choose as their monthly BPCL either corresponding monthly 1972 production levels or average monthly 1975 production. 10 C.F.R. § 212.72 (1977); 41 Fed.Reg. 4931, 4932-33 (1976). In 1979 the DOE added a third choice for production after May 31, 1979: the BPCL could be based on average monthly production in the six-month period ending March 31, 1979. 10 C.F.R. § 212.72 (1980); Fed.Reg. 25,160; 25,167 (1979).

[4]The 1974 regulations provided a bonus of sorts. For every barrel of new oil produced, a producer could sell one barrel of "released" oil at the higher, uncontrolled price, 10 C.F.R. §§ 212.72, 212.74 (1975). Provisions for releasing lower-tier crude oil to the upper tier were eliminated as of February 1, 1976. 10 C.F.R. § 212.72 (1977); 41 Fed.Reg. 4931, 4933 (1976).

While the regulations appear conceptually to be relatively straightforward, their application in some instances proved to be problematic. For example, the regulations required that a BPCL be established for every oil-producing "property." 10 C.F.R. § 212.72 (1975). "Property" was defined as "the right which arises from a lease or from a fee interest to produce domestic crude petroleum." *Id.*[5] The question arose, which is now at the heart of this lawsuit, as to the proper method of calculating a BPCL for large, multilease tracts which during the base year had operated as independent, competing properties but which subsequent to 1972 had embarked upon the cooper-

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In fact, the calculation of new and old oil is further complicated by the regulation regarding "current cumulative deficiency." Once a producer had sold new oil in a particular month (i.e., exceeded the BPCL), any amount, in any succeeding month, by which production fell short of the BPCL, constituted a "deficiency." The sum of such deficiencies constituted the "current cumulative deficiency." 10 C.F.R. § 212.72 (1975). Any later production above the BPCL first had to be applied to reduce the current cumulative deficiency before it could be accounted for as new oil. *Id.* The revised 1976 definition of BPCL contained in the February 1976 amendments to the regulations eliminated, effective February 1, 1976, all then-existing current cumulative deficiencies. 41 Fed.Reg. 4931, 4933.

Finally, under the 1974 regulations, production from stripper well leases was exempt from price control, as required by Section 4(e)(2) of the EPAA. 10 C.F.R. § 210.32 (1975). Stripper well leases were defined as leases on which average daily production per well did not exceed ten barrels. 10 C.F.R. § 212.32(b). In February 1976 when the FEA first imposed a ceiling price on new oil, it eliminated the stripper well exemption also, and provided for it to be sold at upper-tier ceiling prices. 10 C.F.R. § 212.74 (1977); 41 Fed.Reg. 4931, 4940 (1976). The ceiling price on stripper well oil was short-lived, however, as Congress in its August 1976 amendments to the EPAA again required its complete exemption. Energy Conservation and Production Act ("ECPA"), Pub.L. No. 94-385, Section 121, 90 Stat. 1125, 1133, 15 U.S.C. § 757(i). The FEA incorporated the exemption into the regulation in October 1976. 10 C.F.R. § 212.54 (1977); 41 Fed.Reg. 48,323 (1976).

[5]The FEO took the property definition unchanged from the previous CLC regulations at 6 C.F.R. § 150.354 (1974). The definition was grammatically altered in 1976 to read "the right to produce domestic crude oil, which arises from a lease or from a fee interest." 10 C.F.R. § 212.72 (1977); 41 Fed.Reg. 4931, 4940 (1976).

ative production process known as unitization.[6] Did the regulations require that the BPCL for fields unitized after 1972 be established field-wide, by totalling the 1972 production of all properties which made up the unit, or could the BPCL be calculated on an individual, lease-by-lease basis?

To address this issue, the Federal Energy Administration ("FEA") in August 1975 issued Ruling 1975-15 interpreting the existing regulations. 40 Fed.Reg. 40,832 (1975).[7] In Ruling 1975-15 the FEA emphasized that the property concept in the regulations was based on the right to produce crude oil, however arising, and on the need to ensure a meaningful comparison between current and base year production. *Id.* Accordingly, the FEA ruled that in the case of properties unitized after 1972, the producer was required to calculate a unit-wide BPCL by totalling the individual 1972 monthly production for each

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[6]Often numerous competing leaseholds may overlay a single large reservoir of oil. Years of competitive exploitation gradually deplete the reservoir, however, and as natural reservoir pressure lessens annual production may decline. *See* Plaintiff's Memorandum of Points and Authorities in Support of Motion for Summary Judgment ("Pltf. Mem.") at 10. To reverse this decline, producers can undertake various enhanced recovery efforts to increase the pressure in the reservoir, for example through the injection of liquids or gases. *Id.* To do so, however, the previously competing leaseholders must generally group their interests in the single unit comprising all of the interests in the single reservoir of oil. This grouping of interests, usually embodied in a "Unit Agreement," is known as unitization. *Id.*

These efforts will most likely result in the shutting in altogether of wells within certain leaseholds and increasing the production at others, as the enhanced recovery efforts cause oil to flow underground across lease lines. *See* 41Fed.Reg.1564, 1569-70 (1976). Consequently, payments to unit participants are based not on the actual production of a particular participant's wells, but on an imputed percentage of the unit's total production. *Id.*

[7]Preceding the issuance of Ruling 1975-15, in response to requests from producers in late 1974 and early 1975, the FEA issued five formal Interpretations on the subject of the application of the definition of "property" to unitized properties, later published at 42 Fed.Reg. 23,723; 23,726; 23,730 and 25,659 (1977).

of the leases constituting the unit. *Id.* Lease-by-lease calculations were not allowed.

Ruling 1975-15 sparked criticism from the oil industry that the unit BPCL requirement would discourage unitization and hence retard efforts to increase domestic production. *See* 41 Fed.Reg. 1564, 1569 (1976).[8] Furthermore, in December 1975 Congress passed the Energy Policy and Conservation Act ("EPCA"), Pub.L.No. 94-163, Title IV, 89 Stat. 871, 941 (1975), 15 U.S.C. §§ 757 *et seq.*, which among other things directed the FEA to promulgate amendments to the oil price regulations which would stimulate domestic production while at the same time combatting inflation in the prices of petroleum products. EPCA § 401(a); S.Rep. No. 516, 94th Cong., 1st Sess. 116-17, 120-21 (1975); U.S.Code Cong. & Admin.News p. 1762. To achieve these sometimes conflicting goals, Congress directed the FEA to create different classifications of crude oil which would bear different prices. 15 U.S.C. § 757(a). The weighted average price per barrel was not to exceed $7.66. *Id.* To ensure that higher prices would reward only real increases in production, Congress provided specifically in Section 401(a) of the EPCA that no amendment to the regulation could allow the price of any old oil to increase above the existing ceiling, unless the President specifically found that such an amendment would give positive incentives for enhanced recovery techniques, or was necessary to take into account declining production at a property, and would likely result in production greater than what would

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[8]The FEA described two ways in which the unit BPCL requirement could block unitization by discouraging potential participants from entering unit agreements. Producers of stripper well leases might hesitate to join if, when their production was averaged with that of other unit participants, their lease would lose its exempt or upper-tier status. A producer of much new crude oil might similarly hesitate, if the effect of his joining the unit would be to reclassify much or all of his new oil production as old oil due to the relatively low production on neighboring leases. *See* 41 Fed.Reg. 1564, 1570-71 (1976).

have occurred in the absence of the amendment. EPCA § 401(a); 15 U.S.C. § 757(b)(2).[9] "Old oil production" was defined in the EPCA as the average production of old oil, as defined in Section 212.72, at a particular property in the months of September, October, and November of 1975. 15 U.S.C. § 757(b)(3).

In reaction to the industry criticism, and pursuant to the Congressional directives in the EPCA, the FEA in February 1976 amended the oil price regulations. 41 Fed. Reg. 4931 (1976). In response to the Congressional desire for increased production,[10] the amendments addressed three different but overlapping objectives: to provide production incentives generally, to provide incentives for the maintenance of existing units, and to remove disincentives to prospective unitization.[11]

The FEA noted in the preamble to the amendments that production had so declined at older properties that producers could no longer realistically expect to boost volume above 1972 levels, thereby rendering ineffective the lure of higher new oil prices. *Id.* at 4932. Accordingly, the FEA first amended Section 212.72 to provide producers at all properties the option of choosing a more recent, and presumably lower, BPCL based on average old oil production in 1975, rather than 1972. *Id.* at 4933; *see* n. 3, *supra*. In the same spirit, the FEA eliminated all deficien-

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[9]15 U.S.C. § 757(b)(2) in fact provides that the President could find that the price increase would stimulate enhanced recovery projects *or* deep horizon development, but the latter is not relevant to this action.

[10]Part of the FEA response to Congressional desires as to price control was to establish a ceiling price for new oil, which had theretofore been sold without regard to price controls. *See* n. 2, *supra*. The FEA was equally conscious of moderating average oil prices when it selectively applied incentives for unitized properties, depending on the date of unitization. *See* discussion at pp. 821-22, *infra*.

[11]*See* S.Rep. No. 516, 94th Cong., 1st Sess. 190-91 (1975); 41 Fed.Reg. 4931, 4932 (1976).

cies which had accumulated prior to February 1, 1976. 41 Fed.Reg. at 4933. In effect, all properties could begin afresh with a new BPCL and a more realistic chance of producing new oil. *Id.*

In addition, the FEA provided other incentives specifically for unitized properties. The first, applicable to both existing units and those to be formed on or after February 1, 1976, provided that Ruling 1975–15 was rescinded *ab initio* insofar as it required the unit operator to calculate a unit-wide BPCL as of the date of unitization. *Id.* at 4937. Instead, operators could continue to account for production on a lease-by-lease basis until enhanced recovery operations had begun or a significant alteration in producing patterns occurred within the unit. *Id.*

The agency defined "enhanced recovery" as "any method of recovering crude oil in which part of the energy employed to move the crude oil through the reservoir is applied from extraneous sources by the injection of liquids or gases into the reservoir." *Id.* at 4941. A definition of "significant alteration" proved more elusive. The FEA hinted that a significant alteration might occur before an enhanced recovery project had begun operating when "production from certain leases is reduced or discontinued in preparation for enhanced recovery operations." *Id.* at 4937. Although the agency used the term "substantially altered" in its unit BPCL rule, it did not then formally define the term, choosing instead to issue a later Ruling to clarify its meaning. *Id.*

Finally, to further encourage prospective unitization, the FEA enacted a new regulation applicable only to properties unitized after February 1, 1976. *Id.* at 4938. Such units could benefit, first, from a special rule allowing the BPCL to be calculated not on the basis of 1972 or 1975 production, but on the basis of average production in the twelve months preceding calculation of a unit

BPCL, i.e., preceding the date on which a significant alteration in producing patterns occurred or enhanced recovery operations were implemented. *Id.* In addition, the new regulation allowed a modified carryover of the stripper well lease exemption. *See* n. 4, *supra.* Producers at new units could sell at upper-tier prices a volume of crude oil equal to the average volume of stripper well lease production in the twelve months preceding the establishment of a unit BPCL. 41 Fed.Reg. at 4941.

In August 1976 the FEA furnished the promised clarification of "significant alteration in producing patterns," defining it as "the occurrence of either (1) the application of extraneous energy sources by the injection of liquids or gases into the reservoir, or (2) the increase of production allowables for any property that constitutes the unitized property." 41 Fed.Reg. 36,172, 36,184 (1976).[12] At the same time, to eliminate any remaining disincentives to prospective unitization, the FEA adopted a special rule, applicable to units formed after September 1, 1976, to ensure that once a unit BPCL was established there could be no decrease in the absolute volumes of new oil. Producers at such units would be allowed to sell at upper-tier prices a volume of oil equal to the average volume of new oil produced from the constituent properties in the twelve months preceding establishment of a unit BPCL. *Id.* at 36,182, 36,184.

Finally, to dispel any remaining confusion as to the effect of the 1976 amendments to the regulations, the FEA in January 1977 issued Ruling 1977-2, 42 Fed.Reg. 4409 (1977). In that Ruling the FEA made clear that the

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[12] Since "significant alteration in producing patterns" had been defined and because the unit BPCL rule applied to all units regardless of whether they were formed for enhanced recovery purposes, the definition of "enhanced recovery project" was deleted from the regulation effective September 1, 1976. 41 Fed.Reg. 36,172; 36,182.

partial rescission in February 1976 of Ruling 1975-15 allowed operators of units formed before February 1, 1976 to wait, before establishing a unit BPCL, until a significant alteration in producing patterns occurred. Accounting for volumes of new and old oil after the 1976 amendments depended on when the unit was formed and when a significant alteration occurred or enhanced recovery operations were implemented. Section 212.72 applied to units formed before February 1, 1976, and those units received none of the incentives of Section 212.75.[13] Units formed after February 1, 1976 received those benefits of Section 212.75 in effect at the time the operator had to calculate a unit BPCL—the special unit BPCL rule and imputed stripper oil provisions after February 1, 1976, and the provisions for imputed new oil after September 1, 1976. *Id.* at 4415; *see* n. 33, *infra.*

B. *Facts*

1. *Hawkins Field*

In December 1940, oil was discovered at the Hawkins Field, a ten thousand acre field twenty miles north of the town of Tyler in Wood County, Texas. By the late 1940's, more than 200 individuals and companies produced oil from the Hawkins Field on more than 300 leases or tracts within the field. To promote rational exploitation of the field, the Texas Railroad Commission ("TRRC") regu-

[13] *But see* n. 35, *infra.* In addition, the FEA recognized that, as to units at which a significant alteration in producing patterns occurred before February 1, 1976, the regulatory term was not then formally defined. In Ruling 1977-2 the agency stated that the definition effective September 1, 1976, would be used as guidance in conducting compliance audits of pre-1976 units. 42 Fed.Reg. at 4415. Moreover, operators of such units would be allowed to justify the choosing of the date of a "significant alteration" on "reasonable bases other than those specified by the present definition." *Id.* The court rejects the agency's characterization of its action as a relaxation of enforcement policy, but nevertheless upholds its retroactive application. *See* pp. 835-36, *infra; see also* n. 38, *infra.*

lated the number of oil wells within the field, as well as the number of barrels of oil each well could produce, termed production "allowables." PX 5.[14] In addition, the TRRC established a Maximum Efficient Rate ("MER") of production for the field, a limit on the number of barrels which daily could be pumped from the field as a whole. *Id.* Still, by the mid-1960's years of competitive exploitation had so drained the field that natural reservoir pressure declined, allowing the invasion of the crude oil bearing formations by water and the irrevocable loss of oil into the field's original gas cap. Def.Mem. at 14-17. The Hawkins Field interest owners, led by Exxon,[15] owner of two-thirds of the field's production, concluded that this declining trend could be reversed, and the life of the field prolonged, only by means of a cooperative enhanced recovery project. Def.Mem. at 19.

Based on engineering studies conducted at that time, the owners concluded that their enhanced recovery efforts

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[14]The various pleadings and exhibits attached thereto filed in connection with the parties' cross-motions for summary judgment shall herein receive the following designations:

(1) Plaintiff's Memorandum in Support of Motion for Summary Judgment: "Pltf. Mem."

(2) Exhibits to Pltf.Mem: "PX"

(3) Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment: "Def. Opp."

(4) Exhibits to Def.Opp.: "DX Opp."

(5) Defendant's Memorandum in Support of Motion for Summary Judgment: "Def. Mem."

(6) Exhibits to Def.Mem.: "DX"

(7) Plaintiff's Opposition to Defendant's Motion for Summary Judgment: "Pltf. Opp."

[15]At the time of the initial efforts towards unitization, Exxon's interests were in fact held by its predecessor corporation, Humble Oil and Refining Company. For the sake of clarity and simplicity, references made to Exxon shall be understood to mean Humble where appropriate.

would require the construction of a plant for the production of inert gas to be injected underground in order to increase reservoir pressure. *Id.* Before the program could be implemented, however, the field had to be unitized, in part so that the costs of the inert gas plant could be spread among the owners, but also because the injection of gas would cause crude oil to flow underground across lease lines. *Id.* at 20; *see* n. 6, *supra.* Accordingly, as early as 1969 Exxon began promoting unitization. Def.Opp. at 6. Its efforts began in earnest in the summer of 1971 when it first met with the more than 300 other working interest owners of the field. *Id.* Negotiations with these owners, as well as the more than 2200 royalty interest owners, continued for the next few years and culminated in the signing of a Unit Agreement in 1974. DX Intro-4. The agreement named Exxon as unit operator, and provided for the sharing of costs of the inert gas enhanced recovery project. *Id.* art. 11.1. Production, too, was to be shared, according to a formula by which the imputed share attributed to each tract was based on estimates of the recoverable reserves under each tract. *Id.* arts. 5, 6. The TRRC approved the agreement on November 26, 1974, permitting Exxon to take the steps necessary to implement the enhanced recovery project, and providing Exxon with a unit production allowable as of the effective date of unitization, January 1, 1975. DX Intro. 2. Under prior TRRC orders, the production allowables of a shut-in well could be transferred only pro rata among the other wells at the Hawkins Field. The unit allowable, equal to the then existing MER of approximately 112,000 barrels per day, would allow Exxon to transfer production among wells in the unit at will.

At the same time that Exxon began its unitization efforts in 1969, it sought and received permission from the TRRC for an interim conservation project designed to curb the loss of crude oil at the field during the years

needed to unitize the field and to implement the inert gas recovery project. The interim project called for the injection of up to 20 million cubic feet of natural gas per day, extraction of water, and increasing crude oil production. *See* PX 4 at 4. Accordingly, in its order approving the interim project, the TRRC authorized the increase of the Hawkins Field MER from 87,000 barrels per day to 112,000 barrels per day. PX 5. Shortly thereafter the rate of production was boosted up to the new, higher MER, and Exxon began injecting natural gas. It continued the natural gas injections throughout the succeeding years, beyond the effective date of unitization, until the completion of the inert gas plant. The inert gas plant, completed at a cost of some $57 million, commenced operations in March 1977. Def.Mem. at 4.

2. *Exxon's Application of the Oil Price Regulations at Hawkins Field*

As noted above,[16] the CLC in August 1973 promulgated the initial oil price regulations. Those regulations required the calculations of a BPCL for each "property." "Property" was defined as "the right which arises from a lease or from a fee interest to produce domestic crude petroleum." At the time the CLC regulations were promulgated, Exxon already operated several multilease units. Consequently, Exxon had to determine how the regulations would apply to those units. In the fall of 1973 Exxon issued instructions to its employees to treat each unit as a single "property" under the regulations with a single, unit BPCL. PX 46. Indeed, Exxon provided specific instructions for units which, as would be the case of Hawkins Field, were formed after 1972, the base year designated in the regulations for the calculation of the

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[16]For a more detailed description of the regulations and their evolution, including relevant citations, *see* discussion at pp. 818-22, *supra*.

BPCL. For such units, Exxon instructed its employees that:

> To arrive at the base production control level for the unit, sum by individual months the determined . . . base production control level for each accounting lease . . . contributed to the unit.

Id. at 7. In accordance with those instructions, Exxon applied an aggregated, unit BPCL at units it operated in Texas, California, Alabama and Florida. PX 76.

Exxon departed from its prior practice, however, at the Hawkins Field unit. In February 1974, Mr. Sidney J. Reso, Production Manager of Exxon's East Texas Division and supervisor of the effort to unitize Hawkins Field, suggested in a memorandum to his superiors that old and new oil at the Hawkins Field unit be calculated on a lease-by-lease, rather than a unit basis. PX 56. To do otherwise, Mr. Reso warned, would result upon unitization in an 80% reduction in the amount of new, released and stripper oil to be claimed by prospective unit participants. *Id.* In the spring of 1974 a task force was formed at Exxon to study Mr. Reso's suggestion. Def.Opp. at 17. That task force solicited the views of Exxon's in-house counsel as to the legality of Mr. Reso's suggestion under the regulations. On August 8, 1974, Mr. Fred W. File, an attorney in Exxon's legal department, issued a three-page opinion concluding that Mr. Reso's proposal would be acceptable under then applicable FEA regulations. PX 77. Mr. File identified the purpose of the regulations' two-tier pricing system as being to promote additional recovery of crude oil. *Id.* at 2. The application of a unit BPCL to the Hawkins Field unit would result, as Mr. Reso had noted, in a reduction in the amount of new and released oil which unit participants would be able to claim. Such a result, Mr. File concluded, was inconsistent with the regulations' purpose and therefore was "clearly not within [their]

intent." *Id.* Mr. File qualified his opinion, however, by noting that "FEA regulations are subject to frequent interpretations and revisions" and that sale of oil from the unit would be controlled by regulations in effect on the date of sale. *Id.* at 3. Nevertheless, he concluded, it would be appropriate to advise other Hawkins Field interest owners that lease-by-lease calculations would be acceptable under the regulations then in effect. *Id.*

Within a few weeks of the issuance of Mr. File's opinion, Exxon so notified the prospective Hawkins Field unit participants. When Hawkins Field was formally unitized on January 1, 1975, and in the many months thereafter, Exxon did in fact apply individual, lease-by-lease BPCL calculations.

Recognizing that the restructuring of fields after 1972, such as by unitization, raised certain questions under the regulations, the FEA in August 1975 issued Ruling 1975-15, which made explicit the regulations' requirement that a unit BPCL, equal to the sum of the BPCL's of the constituent properties, be calculated and applied to every unit as of the date of unitization. Exxon representatives joined in the chorus of industry criticism of Ruling 1975-15 and met on several occasions in the fall of 1975 with various FEA officials. On November 24, 1975, Mr. File, the author of the August 1974 legal opinion to Mr. Reso, met with FEA General Counsel Michael Butler and presented him with written comments criticizing Ruling 1975-15 as creating insurmountable disincentives to unitization, and asking for its modification or clarification. DX I-3. Three weeks later Mr. Butler informed Mr. File that the FEA was not then considering modification or rescission of Ruling 1975-15, but that the FEA intended shortly to initiate a rule making proceeding to address the special problems associated with enhanced recovery projects at unitized fields. DX Opp. CS-44.

On January 6, 1976, the FEA published a notice of such a rule making, advancing the proposals which were eventually embodied in the February 1976 amendments to the oil price regulations. In its comments on the proposed regulations, Exxon embraced several of the FEA proposals, but suggested that the provision for lease-by-lease calculation of exempt oil should be extended for two years after formation of the unit or until implementation of the injection operations of an enhanced recovery project. PX 188 at 9. Moreover, to prevent the dissolution of existing units, Exxon requested that the same rules be applied to units formed before February 1, 1976. *Id.* Instead, the FEA in the February amendments chose to apply only some of the newly created incentives to preexisting units, and provided that new Section 212.75 would apply only prospectively. The "significant alterations" test, applicable to both, was not defined.

Although heartened by the rescission of Ruling 1975-15, Exxon remained uncertain as to the proper method of accounting for oil at the Hawkins Field Unit, due to the absence of any definition of "significant alteration in producing patterns." After meeting again in mid-February with FEA officials, DX Opp. CS-61, Exxon concluded that until the FEA clarified the meaning of the new regulations, it would be proper to continue its lease-by-lease calculations at the Hawkins Field, and so advised the other Hawkins interest owners. DX Opp. CS-62.

In April 1976, the FEA sought comments as to how best to determine when there occurred "a significant alteration in producing patterns." Exxon responded as it had earlier, namely, suggesting that "significant alteration" be defined as "the initiation of the major injection or other programs contemplated by the unit, provided however that the date will be no longer than two years from the formation of the unit." DX Opp. CS-68 at

Appendix 3, p. 2. In August the FEA finally published the long-promised clarification defining "significant alteration in producing patterns," effective September 1, 1976, as either the injection of liquids or gases into the reservoir or the increase of production allowables for any property constituting the unit. Although still puzzled by this definition as it applied to the Hawkins Field Unit, Exxon attorney Fred File concluded that it did require the calculation of an aggregated, unit BPCL. DX Opp. CS-75. Accordingly, Exxon did calculate such a unit BPCL for the Hawkins Field Unit, but, noting that no definition had existed before that time, did so only as of September 1, 1976, and then under the more generous provisions of Section 212.75. Exxon continued to account for oil production at the Hawkins Field Unit in this manner until the repeal of the oil price regulations in January 1981.

From January 1975 through August 1976 production at the Hawkins Field remained relatively stable at about 112,000 barrels per day. *See* PX 288. Thereafter, despite the implementation of the inert gas enhanced recovery project in March 1977, production began to decline, to about 90,000 barrels per day in July 1977, and finally dropping to about 45,000 barrels per day in January 1981 at the time oil prices were decontrolled. *Id.* Despite the steady decline in production, an increasing percentage of oil was accounted for by Exxon as upper-tier, higher-priced oil, until beginning June 1, 1979, almost all of the then 62,000 barrels per day was classified as new oil. *Id.*; *see* Plaintiff's Appendix of Charts and Graphs, F.

In January of 1978 the DOE issued to Exxon a Notice of Probable Violation, charging it with violating the oil price regulations in its sale of crude oil produced at the Hawkins Field Unit. On June 8, 1978, the DOE brought this enforcement action.

II. *The Unit Property Rule*

DOE maintains that the Hawkins Field Unit, because it was formed before February 1976, has always been subject solely to the requirement of 10 C.F.R. § 212.72 that a unit BPCL be established as of the date of unitization. DOE asserts further that the validity of this requirement, referred to herein as the unit property rule, has been definitively resolved by the Temporary Emergency Court of Appeals ("TECA") in *Pennzoil Co. v. DOE*, 680 F.2d 156 (Em.App.1982), *cert. dismissed*, —- U.S. —, 103 S.Ct. 841, 74 L.Ed.2d 1032 (1983) and that the test of significant alteration in producing patterns, first announced in the preamble to the February 1976 regulations, is relevant to pre-existing units only as guidance in its relaxed enforcement policy.

Exxon denies any controlling effect to the *Pennzoil* case and launches a wide-ranging attack on both the procedural and substantive validity of the unit property rule. The February1976amendments to the regulation, Exxon maintains, were not before the *Pennzoil* court. The significant alterations test constituted an entirely new regulagion, Exxon continues, which cannot be given retroactive effect and which, as applied by DOE, arbitrarily discriminates between units formed before and after February 1976.

A. *Procedural Validity*

[1] Exxon properly notes that the TECA in *Pennzoil* did not have before it the question of the procedural regularity of the issuance of the original CLC regulations in 1973.[17] Exxon argues that the issuance of those regulations wa. fatally flawed because the notice of proposed

[17]The court specified that "[n]o one has claimed that there was any flaw in the rulemaking encompassing the property definition." 680 F.2d at 167.

rulemaking gave no hint that a unit would be considered a single "property."

Section 207(c) of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note, applied to the CLC the informal rulemaking requirements of Section 4 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553. Section 4(a) of the APA requires that "notice of proposed rule-making . . . shall include . . . either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). The purpose of the notice requirement is to afford interested parties a meaningful opportunity to participate in the rulemaking process. *McCulloch Gas Processing v. DOE,* 650 F.2d 1216, 1221 (Em.App.1981). Notice is sufficient if it "fairly apprise[s] the interested persons of the 'subjects and issues' before the agency." *Id.* at 1222, quoting *American Iron and Steel Institute v. EPA,* 568 F.2d 284, 291 (3d Cir.1977).

Under the two-tier pricing structure proposed by the CLC on July 20, 1973, increased or "new" oil production was to be measured for each "property" on which the producer "has leased" or "owns production rights." 38 Fed.Reg. 19,464; 19,482 (1973). Any amount by which current production exceeded 1972 production in a given month could be sold free of price controls. *Id.*

Exxon first complains that the "right to produce" concept underlying the unit property rule was absent from the July 20th notice. Plainly, the proposed regulations did not state in so many words that a unit would be considered a single property. Such precision is not required, however, in order to "fairly apprise" interested parties of the issues before the agency, and reaction to the notice here shows that interested parties were in fact properly alerted. Nine industry commenters specifically addressed the need for a precise definition of the term

"property". *Pennzoil Co. v. DOE, supra,* 680 F.2d at 161. Of these, seven suggested that a unit would or should be considered a single property.[18]

Nor was Exxon as befuddled as it now claims to have been. An internal Exxon memorandum written only days after publication of the proposed rules interpreted them to require that a " 'base production control level' [be] calculated for each property (Lease or Unit) each month . . . ." PX 21. Mr. M. A. Wright, Chief Executive Officer of Exxon U.S.A., evinced his understanding of the unit property rule when he complained to CLC Director John Dunlop that secondary recovery operations might "substantially extend the producing life of older fields without producing 'new' oil under the Phase IV rules." PX 29 at 11; PX 32 at 8–10. Two weeks after Mr. Wright's comments an Exxon representative attended a mid-August CLC conference at which he learned that a unit of oil leases would be considered a single property under the proposed regulations and that "production levels from the combined properties would have to exceed 1972 levels before they were considered to be producing new oil." PX 37. Finally, and most significant, Exxon belied its claimed incomprehension when it applied a unit BPCL without hesitation at its Webster unit on September 1, 1973, just days after the final regulation was published. PX 76.[19]

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[18]The nine industry commenters included Gulf Oil Corporation, PX 27; Exchange Oil & Gas Corporation, PX 26; Union Oil Company of California, PX 28; Texaco, Inc., PX 30; Andover Oil Company, PX 24; Phillips Petrolemu Company, PX 25; Ashland Oil, Inc., PX 23; Ernest Cockrell, an independent oil and gas producer, PX 22; and the Denver law firm of Holme Roberts & Owen, PX 31. The FEA received a total of 272 comments, all of which it considered despite the fact that 110 were filed late. 38 Fed.Reg. 22,536.

[19]That a party follows the clear commands of a final rule does not necessarily prove that it has received sufficient notice of the proposed rule, but where, as in the instant case, the final rule differed so little from the proposed rule, *see* discussion at p. 828, *infra*, Exxon's unhesitating compli-

But Exxon's complaint goes further. The final regulations, it claims, differed so substantially from their proposed form as to render the opportunity to comment meaningless and hence the regulation invalid. The court notes at the outset that the fact that a final rule differs, even substantially, from the published proposal, is not fatal; modification of proposed rules does not automatically generate a new round of notice and comment. *BASF Wyandotte Corp. v. Costle,* 598 F.2d 637, 642 (1st Cir.1979); *International Harvester Co. v. Ruckleshaus,* 478 F.2d 615, 632 (D.C.Cir.1973). As the court wrote in *Trans-Pacific Freight v. Federal Maritime Commission,* 650 F.2d 1235, 1249 (D.C.Cir.1980), "[t]he whole rationale of notice and comment rests on the expectation that the final rules will be somewhat different—and improved—from the rules originally proposed by the agency."

Yet such explanations are unnecessary here, where that portion of the rule *sub judice,* as finally promulgated, differs hardly at all from its proposed form. Admittedly, the CLC noted in the preamble to the final rule that "Subpart L in its final form has been changed extensively from the proposal that was published on July 19, 1973." 38 Fed.Reg. 22,536. Comparison of the proposed and final forms reveals, however, that the changes were made primarily in those parts of Subpart L dealing with refiners and retailers, and not in that part dealing with crude oil production. *Compare* 6 C.F.R. §§ 150.355—150.363 (1974), 38 Fed. Reg. 22,539—22,543, *with* proposed rules 6 C.F.R. §§ 150.355—150.362, 38 Fed.Reg. 19,482 — 19,483. To be sure, the word property was separately defined in final form, as "the right which arises from a lease or from a fee interest to produce domestic crude petroleum." 6 C.F.R. § 150.354(b) (1974), 38 Fed.Reg. at

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ance with the unit property rule on September 1, 1973 is certainly evidence that it understood the virtually identical proposed rule a month earlier.

22,538. But the proposed formula for calculation of new and old oil referred to the property at which a producer "has leased" or "owns production rights." 38 Fed.Reg. at 19,482. This court perceives no real difference, much less a substantial one, between the two forms.

[2] Contrary to Exxon's contentions, the notice and comment provisions of the APA "d[o] not require every aspect of the proposed order to be explained in the general notice." *Common Carrier Conference v. United States,* 534 F.2d 981, 982–83 (D.C.Cir. 1976), *cert. denied* 429 U.S. 921, 97 S.Ct. 317, 50 L.Ed.2d 288 (1976). Industry reaction to the CLC proposal, including that of Exxon, indicates that "[t]he industry was generally on notice" as to the workings of the two-tier pricing structure, *id,* thereby satisfying the notice and comment requirements of the APA.

Exxon contends, however, that CLC failed to satisfy the second requirement of APA procedures for informal rulemaking, namely, that the agency publish, along with the final rules, "a concise general statement of their basis and purpose." 5 U.S.C. § 553(c). The CLC, says Exxon, failed to do so, rendering the oil price regulation invalid.

The primary purpose of requiring a contemporaneous statement of basis and purpose is to enable a reviewing court to judge the reasonableness of a rule in light of its stated aims. *American Standard, Inc. v. United States,* 602 F.2d 256, 269, 220 Ct.Cl. 411 (Ct.Cl.1979). But informal rulemaking does not demand an exhaustive listing of factual findings, nor a full reasoned analysis, but instead a "concise general statement." *Citizens to Save Spencer County v. EPA,* 600 F.2d 844, 883–84 (D.C.Cir.1979); *see* 1 K. Davis, *Administrative Law Treatise* § 6:12 (2d ed. 1978). And where the agency's aims are obvious and unmistakable, courts have upheld rules with no statement of basis and purpose. *See Tabor v. Joint Board for Enroll-*

ment of Actuaries, 566 F.2d 705, 710 (D.C.Cir.1977); *Alabama Ass'n of Insurance Agents v. Board of Governors of the Federal Reserve System,* 533 F.2d 224, 236 (5th Cir.1976); *Hoving Corp. v. FTC,* 290 F.2d 803, 807 (2d Cir.1961); *American Standard, Inc. v. United States, supra,* 602 F.2d at 269. Examination of the preamble to the final oil price regulation, along with contemporaneous agency statements cited therein, when viewed in the surrounding regulatory context, provides ample evidence from which a reviewing court may discern the basis and purpose not only of the regulation generally, but also of that part of it about which Exxon complains, the unit property rule.

The preamble to the final rules stated:

> A 2-tier price system has been adopted providing for a ceiling on domestic crude petroleum prices but allowing new crude and an equivalent amount of old crude to be sold at prices above the ceiling.

38 Fed.Reg. 22,536. Implicit in a structure which rewards only additional production with higher prices, and obvious even to those less sophisticated than Exxon, is a goal of inducing increased domestic crude oil production while keeping average prices down. But if Exxon could not glean that meaning from the regulation alone, the preamble referred to an August 10th press release from CLC Director John Dunlop which unequivocally stated:

> The Council has been very concerned that the final regulations strike a delicate balance between constraining prices while at the same time encouraging the necessary increase in supplies which the country must have.
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> * * *
>
> The "2-tier" pricing system . . . is expected to stimulate domestic crude oil production while maintaining price controls on oil presently being produced. The

> "2-tier" system will encourage increased investment in domestic exploration and will provide an economic incentive to allow the recovery of a larger percentage of oil in existing reservoirs.

PX 36.

Not only were the CLC's twin goals implicit in the regulation, but the unit property rule itself, requiring that each unit be treated as a single property, inhered as well in the regulations when viewed in the context of the surrounding statutory scheme. The 1973 CLC oil price regulations were but a small part of the fourth phase of the economy-wide federal program of price controls to which the oil industry, including Exxon, had long been subject. As such, the CLC regulations carried forth the primary statutory mandate to hold down prices of crude oil by putting a ceiling price on much of domestic production. The CLC's attemt to boost domestic oil production while keeping prices down could succeed only if production increases were real and not the result of gerrymandering. Even Exxon perceptively noted in its comments to the proposed regulations that one possible result of the two-tier price system could be that a producer's "strongest incentive would be to obtain higher prices by arranging production in such a way as to shift oil into the 'new' category to the maximum extent possible." PX 32 at 9. The unit property rule was implicit in the regulation because, as the TECA has already found, it was dictated by the CLC's "duty to reasonably inhibit gerrymandering of boundaries undertaken to avoid price controls." *Pennzoil Co. v. DOE, supra,* 680 F.2d at 169.

The explicit agency pronouncements as to the basis and purpose of the August 1973 oil price regulations not only satisfy the requirements of a concise, general statement, but surpass that requirement insofar as the regulations'

basis and purpose were clear from the regulations themselves and hence in need of little further explication.

Accordingly, the court finds that the August 1973 CLC oil price regulations were issued in accordance with all the applicable procedural requirements of the APA.

B. *Substantive validity*

1. *Stripper well exemption*

[3] In the first of several attacks on the substantive validity of the unit property rule, Exxon argues that to require a unit containing stripper well leases to be treated as a single property is unlawful because to do so would contravene the intent of Congress when it exempted stripper well oil from price controls. In support of its argument Exxon first traces the evolution of the stripper well exemption through its several manifestations,[20] from its original enactment in the mid-November 1973 Trans-Alaska Pipeline Authorization Act ("TAPAA"), Pub.L. No. 93-153, § 406, 87 Stat. 576, 590, its virtually identical reenactment only days thereafter in the EPAA in late November 1973, the brief subjection of stripper well oil to upper-tier ceiling prices as mandated by the EPCA in December 1975, and the final return of stripper well production to exemption in August 1976 under the Energy Conservation and Production Act ("ECPA"), Pub.L. No. 94-385, § 121, 90 Stat. 1125, 1132-33, 15 U.S.C. § 757(i). Exempt production was originally defined in Section 406 of the TAPAA as crude oil "produced from any lease whose average daily production of such substances for the preceding calendar month does not

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[20] The summary of the history of the stripper well exemption in the text is recounted in greater detail in *In re DOE Stripper Well Exemption Litigation*, 690 F.2d 1375, 1380-86 (Em.App.1982). *See also* n. 4, *supra*.

exceed ten barrels per well.[21] The original CLC regulation in November 1973 implementing the exemption defined "stripper well lease" as

> a "property" whose average daily production of crude oil petroleum and petroleum condensates, including natural gas liquids, per well did not exceed 10 barrels per day during the preceding calendar month.

38 Fed.Reg. 32,494, 32,495 (1973); 6 C.F.R. § 150.54(s)(2). "Property" was in turn defined as

> the right which arises from a lease in existence in 1972 or from a fee interest to produce domestic crude petroleum in existence in 1972 and is coextensive with that property used in § 150.354(b) [later § 212.72] for purposes of determining "base production control level."

38 Fed.Reg. at 32,495 (1973); 6 C.F.R. § 150.54(s)(2).

The issue before the court is to determine the proper method to account for production from individual stripper well leases which, prior to February 1976, joined with other non-stripper tracts to form an enhanced recovery unit such as the Hawkins Field Unit. The DOE maintains that upon unitization individual stripper well leases lost their exempt status and that the "property" for purposes of applying the stripper well exemption becomes the unit rather than the individual lease. In other words, according to the DOE, the stripper well exemption applies to production from units formed prior to February 1976[22]

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[21] Production at individual wells could exceed ten barrels per day and not undo the exemption so long as production from other wells was sufficiently low so that average production per well did not exceed ten barrels per day.

[22] In the February 1, 1976 amendments to the regulations, the FEA provided that producers at units formed thereafter could sell at upper-tier prices a volume of crude oil equal to the average volume of stripper well lease

only if average production per well for the unit as a whole is under ten barrels per day.

Exxon disputes DOE's interpretation and argues that even if a unit BPCL is applied for the purposes of calculating amounts of new and old oil, those particular constituent properties which before unitization qualified as stripper well leases must continue after unitization to enjoy their exempt status.[23] The DOE interpretation, says Exxon, is contrary to the plain language and underlying purpose of the several federal statutes providing special treatment to stripper well production, as well as inconsistent with the DOE's own implementing regulations.

In support of its own interpretation, Exxon first points to the language in Section 406 of the TAPAA, reiterated in Section 4(e)(2) of the EPAA, which exempted production "from any *lease* whose average daily production . . . does not exceed ten barrels per well . . . ." (emphasis added). The original implementing regulations defined "stripper well lease" in terms of "property" which was in turn defined as "the right which arises from a *lease in existence in 1972* or from *a fee interest . . . in existence in 1972*." 38 Fed.Reg. at 32,495 (1973) (emphasis added). The FEA later gave added protection to strippers when it promulgated the "Gypsy Rose Lee Rule," a "once-a-stripper-always-a-stripper" policy under which a stripper

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production in the twelve months preceding the establishment of a unit BPCL, an amount termed "imputed stripper well oil." 41 Fed.Reg. 4931, 4941 (1976); 10 C.F.R. § 212.75(f) (1977). When Congress mandated the return of stripper well oil to exempt status eight months later, the FEA amended the regulations to allow "imputed stripper well oil" to be free of any price controls. 41 Fed.Reg. 36,172; 36,184 (1976).

[23] Exxon appears at first to argue that the unit property rule cannot be applied at all to any unit containing stripper well leases. *See, e.g.*, Def.Mem. at 116 ("[T]o the extent that the DOE's reading of the 'property' regulation in this case requires that a unit be regarded as a single 'property' for purposes of the stripper well lease exemption, it is beyond the agency's statutory authority and is invalid and unenforceable.") In its Reply Memorandum Exxon retreats from this extreme position. *See* Def. Reply at 14.

well property, once qualified, would always retain its exempt status even if average daily production thereafter exceeded ten barrels. 10 C.F.R. § 210.32; 40 Fed.Reg. 22,123, 22,124 (1975). The intent of Congress, argues Exxon, made explicit in the regulations, was to accord special treatment to stripper well leases, to be preserved through lease-by-lease accounting after unitization, so that production would be maintained at these marginal properties. To allow the stripper well exemption to be swallowed up and lost upon unitization, Exxon contends, would contravene that Congressional intent.[24]

To accept Exxon's interpretation of the stripper well exemption would greatly over-state its reach and would accord it an importance, above all other competing Congressional purposes, far beyond Congress's intent.[25] The

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[24]Exxon also argues that in enacting the EPCA Congress intended that the FEA remove the barriers to unitization which the oil industry had identified as resulting from the unit property rule as set forth in Ruling 1975-15. Among those barriers was the reluctance of stripper well leaseholders to join a unit if doing so would cause their oil to lose its exempt status. *See* n. 8, *supra*. The FEA responded in February 1976 when it created a measure of "imputed stripper well oil" which could be claimed by units formed after that date. *See* n. 22, *supra*. To deny the benefits of the imputed stripper well exemption to units formed before February 1976, says Exxon, contravenes Congressional intent in the EPCA and ECPA because to do so maintains the disincentives faced by stripper well leaseholders asked to join an enhanced recovery unit. The court addresses in greater detail at pp. 836–40, *infra*, the issue of discrimination by the FEA in February 1976 between preexisting and future units. It is enough for the purposes of the present discussion to note that those eager to form a unit could persuade reluctant stripper well leaseholders to join by providing in the unit agreement a formula for the allocation of production to such leaseholders which would recognize the sacrifice they made in joining the unit—in other words, by paying them more. Indeed, even under 10 C.F.R. § 212.75(f), stripper well production is imputed to the unit as a whole, and not to individual leaseholders. *See Francis Oil & Gas Co. v. Exxon Corp.*, 687 F.2d 484, 490 (Em.App.1982). Allocation of imputed upper-tier or exempt oil within the unit was left to private contract. *Id.*; 41 Fed.Reg. at 4937.

[25]Exxon's heavy reliance on the plain language of the TAPAA and the EPAA, referring to exempt production from stripper well "leases," is undermined by the choice of Congress, in reenacting the exemption in

limited purpose of the exemption was, as Exxon correctly states, to maintain production at marginal properties, operation of which would not otherwise be economically feasible. *See Francis Oil & Gas Co. v. Exxon Corp.*, 687 F.2d 484, 485 (Em.App.1982). Still, Congress recognized the enormous potential for abuse of the exemption and consequently gave the FEA broad powers to make rules to limit such abuse. As the TECA wrote in the leading case interpreting the stripper well exemption, "[t]he exemption benefits to well operators to have their leases declared 'stripper well' was an enormous incentive for manipulation of the exemption. The President and Congress vested with the FEA broad authority to prevent such abuses." *In re DOE Stripper Well Exemption Litigation*, 690 F.2d 1375, 1386 (Em.App.1982). That court quoted extensively from the Conference Report accompanying the TAPAA:

> The Congress intends that the provisions of this section will be strictly enforced and regulated by the administering agency to insure that the *limited* exemption of this class of wells for the express purposes described above is not in any way broadened .... *The Conferees expect the administering agency . . . to provide by regulation safeguards against the manipulation of gerrymandering of lease units in a manner that evades the price control and allocation programs.*
>
> *These regulations shall be so designed as to provide safeguards against any abuse, over-reaching or altering of normal patterns of operations to achieve a benefit under this section which would not otherwise be available* .... The *sole* purpose and objective of this Section 406 is to keep stripper wells — those producing less

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Section 121 of the ECPA, to substitute the word "property" for "lease." *See* 90 Stat. 1132-33 (1976).

> than ten barrels per day — in production .... It is not intended to confer any benefit on the owners and operators of wells producing in excess of ten barrels per day.

Id. at 1387 quoting H.R.Rep. No. 624, 93d Cong., 1st Sess. 30 (1973), (emphasis added), U.S.Code Cong. & Admin.News, p. 2417.

The legislative history of the TAPAA makes unmistakably clear the very narrow scope of the stripper well exemption and the broad authority vested in the FEA to prevent its abuse. To allow individual stripper well leases to keep their exempt status after unitization, after enhanced recovery efforts could shift oil production across lease lines and distort production patterns, would result in "an exemption which would have an impact far in excess of that ever contemplated by Congress." *In re DOE Stripper Well Exemption Litigation, supra,* at 1388. To be sure, a primary concern of Congress expressed in the TAPAA Conference Report was that existing lease lines would be gerrymandered "to average down high production wells with a number of low production stripper wells to remove the high production wells from price ceilings." H.R.Rep. No. 624, 93d Cong., 1st Sess. 30 (1973), U.S.Code Cong. & Admin.News, p. 2532. Congress's underlying purpose of preventing any "altering of normal patterns of operations to achieve a benefit under this section which would not otherwise be available", *id.*, applies equally, however, to shifts of production across lease lines underground after unitization as it does to shifts of the lease lines themselves.[26] Were the FEA to have adopted Exxon's interpretation, it would have ig-

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[26]The possibilities for abuse are illustrated by practices at the Hawkins Field itself, where after unitization average production at a few stripper well leases jumped at times to between 30 and 80 barrels per day, and in one case to 118 barrels per day. PX 309, 310; *see* Pltf. Opp. at 25 n. 21.

nored its statutory duty "to prevent manipulation of lease units in a manner that evades the price control and allocation programs." *In re DOE Stripper Well Exemption Litigation, supra* at 1381. Application of the unit property rule to the stripper well lease exemption is a proper balancing of Congressional aims, *see Pennzoil Co. v. DOE, supra,* 680 F.2d at 169, and is consistent with "the prevailing view that a unit forms a single property for the purposes of calculating the various regulatory classifications in the federal petroleum pricing schemes", *Francis Oil & Gas Co. v. Exxon Corp., supra,* 687 F.2d at 488, including the classification of stripper well oil.

2. *The production incentive objective of the two-tier pricing structure*

In several different ways Exxon argues that DOE, in its singleminded pursuit of the objective of controlling prices, ignored or even frustrated Congressional desires to spur increased production. Citing contemporaneous statements by various agency employees, Exxon maintains that the overriding purpose of the two-tier oil pricing structure, from its inception in August 1973 pursuant to the ESA, through its successive rebirths pursuant to the EPAA and the EPCA, was to provide incentives to the oil industry to increase domestic crude oil production. The unit property rule, Exxon contends, is arbitrary and capricious, without rational basis, and in excess of statutory authority, because it contravenes Congressional intent in two ways.

First, and in particular, Exxon claims that the effect of the unit property rule in discouraging unitization is contrary to several of the objectives of the EPAA specifically enumerated by Congress, including protection of public health and national security, preservation of an economically sound and competitive petroleum industry, economic efficiency, and minimization of economic distortion. *See*

EPAA § 4(b)(1); 15 U.S.C. § 753(b)(1). Second, and more generally, Exxon maintains that the effect of the unit property rule, in erecting insurmountable barriers to unitization and enhanced recovery projects, defeats the purpose of encouraging increased production. Application of the unit property rule to the Hawkins Field Unit, Exxon asserts, would result in the loss, upon unitization, of virtually all of the new and stripper well oil which was being produced from particular constituent properties prior to unitization. As the FEA itself recognized, *see* n. 8 *supra,* and as Exxon attempts to show by deposition testimony of Hawkins Field interest owners, *see* Def.Mem. at 169-175, prospective unit participants who were producers of new and stripper well oil might be reluctant to join the unit if, when their production was averaged with that of other unit participants, it would lose its exempt or upper-tier status.

The court may strike down the unit property rule only if it is arbitrary or capricious. That standard of review requires this court to uphold the unit property rule "if upon consideration of relevant factors, there was no clear error of judgment and there is a rational basis for the conclusions reached by the administrative body." *Grigsby v. DOE,* 585 F.2d 1069, 1074 (Em.App.1978). Moreover, it is well-settled that deference is due the interpretations of statutes and implementing regulations by the agency charged with their enforcement. *Pasco, Inc. v. FEA,* 525 F.2d 1391, 1400 (Em.App.1975). Deference is particularly appropriate when the agency is confronted with the "gargantuan task" of achieving the equitable allocation of crude oil at equitable prices under "recognized emergency conditions." *Id.* at 1394. As the TECA has written in *Consumers Union of the United States, Inc. v. Sawhill,* 525 F.2d 1068 (Em.App. 1975):

> "[T]he width of administrative authority must be measured in part by the purposes for which it was conferred." Nowhere could this oft-repeated rubric be more relevant than where Congress acts in a crisis situation. The Emergency Petroleum Allocation Act is Congress' response to precisely such a situation.

Id. at 1077 (citations omitted).[27]

Congress knew when it enacted the EPAA that the nine objectives listed therein were not all mutually attainable. In fact, Congress recognized that "in some instances, it may be impossible to satisfy one objective without sacrificing the accomplishment of another." H.R.Rep. No. 628, 93d Cong., 1st Sess. 12 (1973), U.S.Code Cong. & Admin.News, pp. 2582, 2688. Congress directed only that the EPAA objectives be sought "to the maximum extent practicable", 15 U.S.C. § 753(b)(1), indicating the need for the agency to balance competing considerations. *Consumers Union of the United States v. Sawhill, supra,* 525 F.2d at 1073.[28] The most important balance to be struck, Congress recognized, was the "equitable balance between the sometimes conflicting needs of providing adequate inducement for the production of adequate supply of product and of holding down spiraling consumer costs."

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[27] *See also Pasco, Inc. v. FEA,* 525 F.2d 1391, 1394 n. 6 (Em.App.1975) ("This phrase ['gargantuan task'] was similarly applied to the burden imposed on the Cost of Living Council under the [Economic] Stabilization Act [of 1970] which, like the [Emergency Petroleum] Allocation Act, was an extremely broad delegation of authority by Congress to the executive Branch under recognized emergency conditions.").

[28] When the district court in *Pasco., Inc. v. FEA, supra,* invalidated the FEA's failure to extend a particular exemption to all small refiners, finding that failure contrary to one of the enumerated purposes of the EPAA, the TECA reversed, writing:

> "[T]he FEA had at the same time to consider the other eight objectives of Section 406(b)(1), including . . . equitable distribution of crude oil at equitable prices." 525 F.2d at 1397.

H.R.Rep. No. 628, 93d Cong., 1st Sess. 26 (1973), U.S. Code Cong. & Admin.News, p. 2073.

The particular balance struck by the agency when it promulgated the unit property rule has already been approved by the TECA in *Pennzoil Co. v. DOE, supra,* 680 F.2d 156 (Em.App.1982). Although the court's express holding was limited to upholding Ruling 1975-15 as a valid interpretation of the property definition in 10 C.F.R. § 212.72, the court made unmistakably clear its conclusion that the regulation itself was consistent with Congressional intent as expressed in the underlying statutes.

That result, the court found, was dictated by its prior holding in *Grigsby v. DOE, supra,* 585 F.2d 1069 (Em.App.1979). In *Grigsby* plaintiff operated a unit, consisting of five previously independent tracts, with one unit well. When that unit well began producing excessive salt water, Grigsby drilled a substitute well in 1974 on another of the constituent tracts. Grigsby's treatment of all oil from the substitute well as new oil was challenged by the FEA, which applied the unit property rule to insist that prior production from the first well had to be included in the calculation of a unit BPCL from which amounts of new and old oil production at the second well could be determined. The *Grigsby* court upheld the FEA, stating that "[t]o allow the unit to define the property . . . is consistent with both the language of the definition *and the purposes of the Act.*" *Id.* at 1075 (emphasis added).[29]

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[29]Upon rehearing, the court found that under Louisiana law, the original state order compelling unitization of the five properties created a unit only for purposes of production from the reservoir in which the first well had been drilled. 585 F.2d at 1084. Grigsby's second well, although within the contours of the five properties, produced oil from a geologically separate reservoir and therefore created a separate "right to produce" under state law. *Id.* at 1085. As such, the court held Grigsby was permitted to treat all production from the second well as new oil. *Id.* The court's finding in no way detracted, however, from the strength of its earlier holding that the right to produce defined the property for purposes of federal price control regulations, but

The facts in the *Pennzoil* case, involving a field in production in 1972 but which was unitized after 1972 and before February 1976, are more directly on point. On May 1, 1974 the thirty-nine separate tracts of the Walker Creek Field were combined to form a unit and Pennzoil was designated as unit operator. Prior thereto each tract produced separately and had been assigned a separate BPCL. Ten months after unitization Pennzoil began gas injection, but continued nevertheless for another five months, until the issuance of Rule 1975–15, to account for production on a lease-by-lease basis, as it had since the field was unitized. Pennzoil brought suit to challenge the validity of Ruling 1975–15. The TECA held that Ruling 1975–15, which embodied the unit property rule, would, "[e]ven in the absence of our prior decisions . . . be sustainable as a reasonable interpretation. It is consistent with the language of the property definition. *It rationally balanced the objectives of the two-tier pricing structure.*" 680 F.2d at 179 (emphasis added).

Exxon's challenge to the validity of the unit property rule is without merit, fundamentally flawed by the myopia of which it accuses the DOE. Exxon chooses to see only one purpose to the two-tier pricing structure, that of providing production incentives, while ignoring the numerous other objectives which the agency had to consider, including the most fundamental, that of price control. Admittedly, as the agency itself recognized, the unit property rule does create some disincentives to unitization and hence in some measure discourages the extra production which might come from enhanced recovery projects.[30] But as the TECA has repeatedly recognized,

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merely recognized that the right to produce could arise not only through contractual relations, but also by state law. *See id.* at 1083.

[30] *See* n. 8, *supra*. But Exxon exaggerates the importance of the disincentive created. It argues that holders of leases producing much new or stripper oil would simply refuse to join a unit if doing so would cause their oil production

the DOE was entrusted by Congress with the task of balancing multiple, conflicting objectives. *Pennzoil Co. v. DOE, supra,* 680 F.2d at 169. The two-tier price system was set up originally primarily "to halt the inflationary spiral in domestic oil prices." *In re DOE Stripper Well Exemption Litigation, supra,* 690 F.2d at 1380. Exxon, in its singleminded emphasis on production incentives, ignores the teaching of the *Pennzoil* court when it wrote that "Pennzoil's reading of the definition would disregard the agency's primary responsibility of balancing objectives and ignore its duty to reasonably inhibit gerrymandering of boundaries undertaken to avoid price controls." 680 F.2d at 169.

In *In re DOE Stripper Well Exemption Litigation, supra,* 690 F.2d 1375, the district court invalidated the FEA rule excluding injection wells from the calculation of "average daily production" for the purposes of identifying exempt stripper well properties. The district court

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to lose its exempt status. But as discussed in n. 24, *supra,* it would not be a difficult matter for Exxon to devise a formula, to be incorporated in the unit agreement, compensating such reluctant leaseholders for their sacrifice and persuading them to join the unit. To be sure, to the extent the other prospective participants, eager to induce the necessary cooperation of the stripper and new oil producers, would have to pay such producers more, they would in turn earn that much less from the unitization scheme. But to say that the other participants would earn some lesser amount is not to conclude that the unitization project would necessarily be scuttled. The success of a unitization and enhanced recovery project depends on the amount of additional oil it will yield above what could be produced in the absence of unitization. If the amount of additional oil is sufficiently large, then the present value of the stream of payments to unit participants after unitization could be greater than the present value of the stream payments which would flow to those interest holders from a continuation of pre-unitization, competitive production—even if post-unitization production must be sold at old oil prices and even as adjusted to account for buying off the reluctant stripper and new oil producers. This is not to say that in fact such would be the case at, say, the Hawkins Field. But Exxon's contention that the unit property rule in all cases necessarily presents insuperable obstacles to unitization is incorrect. And any cost which the rule's application adds to the process of unitization are reasonable in light of the agency's obligation to protect against gerrymandering and evasion of price controls.

found the rule arbitrary and capricious because it was a disincentive to enhanced recovery projects which rely on such injection wells. The TECA reversed. Although the TECA's holding is not directly applicable to Exxon's challenge to the unit rule, the language the court used is particularly telling and bears repeating here. The error of the district court, wrote the TECA, and the error of Exxon here, this court would add, was:

> its total reliance on production incentives. It fails to adequately weigh the other side of the coin. Price controls on oil was the fundamental purpose of the legislation. It is obvious that Congress in no way intended to create an opportunity for mass evasion of those controls.

690 F.2d at 1392.

Similarly here, as the TECA has already found, application of the unit property rule requiring that a unit be considered a single property with a single, aggregated BPCL for the purposes of calculating quantities of new, released, stripper and old oil, is a reasonable balancing of competing Congressional purposes which must be upheld by this court.

C. *The February 1976 amendments to the regulations*

Although the *Pennzoil* court clearly upheld the unit property rule of 10 C.F.R. § 212.72, that court expressly declined to consider the effects of later amendments to the oil price regulation on the application of that rule.[31] Effective February 1, 1976, however, the FEA rescinded

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[31] After discussing the rescission of Ruling 1975-15 by the agency in February 1976, and the announcement of the "significant alterations in producing patterns" test, the TECA in *Pennzoil* concluded: "There is not now before us any issue concerning the application of this subsequent rulemaking and we refrain from expressing any opinion concerning it other than that it does not militate against our disposition of the issues presented to us on this appeal." 680 F.2d at 164 n. 13.

Ruling 1975-15 *ab initio*, and declared that operators of units formed both before and after that date need not calculate a unit BPCL until there occurred a "significant alteration in producing patterns." Moreover, units formed after February 1, 1976 could benefit from the newly-created Section 212.75, providing for a more liberal unit BPCL rule, imputed stripper well oil, and, as of September 1, 1976, imputed new oil.

The DOE contends that the Hawkins Field Unit has always been subject to the strict requirements of Section 212.72 alone, namely, that a unit BPCL be established as of the date of unitization. DOE maintains that the rescission of Ruling 1975-15 as to pre-existing units was only a relaxation of enforcement policy, and that with respect to such units the "significant alteration" test serves only as guidance in compliance audits. See Ruling 1977-2, 42 Fed.Reg. 4409, 4415 (1977). Exxon argues that the "significant alterations in producing patterns" test constituted an entirely new regulation, not applicable before September 1, 1976, the effective date of the formal definition of the term. Any attempt to apply it before that date, says Exxon, would constitute unlawful retroactive rulemaking. Exxon further asserts that to deny to pre-existing units the benefits of Section 212.75 given to units formed after February 1, 1976 is arbitrary and capricious discrimination.

1. *Retroactivity*

[4] The DOE's attempt to characterize its rescission of Ruling 19[illegible] as a mere relaxation in enforcement policy cannot withstand scrutiny. The agency's pronouncements in February 1976 amounted to a completely new, although less strict, interpretation of the property definition in Section 212.72.

That definition of "property" as "the right to produce domestic crude oil from a lease or from a fee interest" had generated some confusion as to its proper application to unitized properties. The FEA eliminated that confusion when, in Ruling 1975-15, it made explicit what was implicit in the regulation itself—the requirement that a unit be treated as a single property. In that Ruling the FEA stated:

[T]he need for comparison of like quantities requires the producer in computing the BPCL to measure and total the individual 1972 monthly production levels for each of the leases that now comprise the unit.

40 Fed.Reg. 40,832(1975).

Only five months later, however, the agency, in equally clear terms, rescinded that interpretation *ab initio*. In the preamble to the February 1976 amendments, the agency explained:

> Ruling 1975-15 is rescinded *ab initio* insofar as it requires producers of unitized properties to total all the BPCL's of the participating leases and to treat the unit as a single property, before such time as there has been a significant alteration in pre-unitized producing patterns of the individual leases.

41 Fed.Reg. at 4937. Nowhere in the preamble is there any hint that the agency intended the rescission of the strict unit property rule embodied in Ruling 1975-15 to be merely a relaxation of enforcement policy as applied to pre-existing units. Indeed, when the agency intended such a discriminatory result, it stated its aim clearly. For example, it established the special unit BPCL rule of Section 212.75 "[f]or units established later in 1976, or thereafter." 41 Fed.Reg. at 4938 (1976). However, it rescinded Ruling 1975-15 not prospectively alone, but *ab*

initio. In other words it was as if that interpretation had never existed.

[5] To conclude, however, that the significant alterations test, finally defined effective September 1, 1976, constituted a new interpretation of Section 212.72 does not preclude its application before that date. The fundamental criterion for determining whether a statute, regulation or interpretation may be applied retroactively is one of reasonableness. *Pennzoil Co. v. DOE, supra*, 680 F.2d at 175. Generally speaking, " 'retroactive rules are valid if they are reasonable, but are invalid if their retroactivity is unreasonable in the circumstances.' ". *Id.*, quoting 2 K. Davis, *Administrative Law Treatise* § 7.23, at 109 (2d ed. 1979). The court must weigh the mischief which might follow if the rule is denied retroactive effect, thereby producing a result contrary to statutory design or legal and equitable principles, against the ill effect of retroactive application of the new rule. *Pennzoil Co. v. DOE, supra*, 680 F.2d at 175. Among the factors weighing in the balance are the extent to which a party has relied on previously settled law and the burden which the retroactive rule would impose on a party. *Id.*

[6] Brief reflection on the factors cited reveals the fatal flaw of Exxon's argument that the significant alterations test cannot be applied retroactively. Courts need concern themselves with possible injury to a party, and might hesitate to apply a rule retroactively, only if the new rule is stricter than the standard on which the party relied in the past. Exxon, however, suffered no injury from retroactive application of the new interpretation, because the significant alterations test was less stringent than the rule it replaced. Under Ruling 1975-15, the unit property rule required that a unit BPCL be established as of the legally effective date of the unitization agreement. The new interpretation, adopted in February 1976, al-

lowed a producer to postpone establishing a unit BPCL and to continue lease-by-lease accounting until production patterns had been significantly altered, perhaps months or even years later. In *Pennzoil Co. v. DOE, supra*, the TECA found that retroactive application of Ruling 1975–15 involved no unfairness because it simply clarified uncertain law, making explicit what was implicit in the underlying property regulation. 680 F.2d at 176. If the retroactive application of that strict requirement, that a unit BPCL be calculated as of the date of unitization, involved no unfairness, then surely the retroactive relaxation of that standard cannot be unfair.

2. *Discrimination between units formed before and after February 1, 1976*

[7] Exxon argues that, fairly read, Section 212.75, including its beneficial provisions for a special unit BPCL rule and imputed stripper well and new oil, applies generally to all units regardless of the date on which they were formed.[32] In the alternative, Exxon argues that DOE's denial of the benefits of Section 212.75 to units formed before February 1, 1976 arbitrarily discriminates between similarly situated parties without explanation.

Exxon's first argument is mistaken. Exxon apparently would like this court to interpret the regulations to conform with Exxon's practices: that Section 212.75 applies in its entirety to all units, including pre-existing

[32]At units formed after February 1, 1976 producers could calculate the unit BPCL based on average production not in 1975 or 1972 but in the twelve months preceding the date on which enhanced recovery operations began or a significant alteration in producing patterns occurred. Producers at new units could also sell at upper-tier prices "imputed stripper well oil" and, as of September 1, 1976, "imputed new oil," both calculated on the basis of the average volume of such production from the properties comprising the unit during the same twelve months. Existing units, on the other hand, received lesser incentives, including the revised 1975 BPCL base period, the elimination of cumulative deficiencies, and the retroactive rescission of Ruling 1975-15. *See* discussion at pp. 820-21, *supra*, and citations therein.

units such as the Hawkins Field Unit, but it applies only after September 1, 1976. That, of course, is not what the agency intended. As the FEA spelled out in the preamble to the February 1976 amendment, describing Section 212.75, "[f]or units established *later in 1976 or thereafter* . . . a special rule for unitized properties was proposed for commend and is adopted today." 41 Fed.Reg. at 4938. In the same preamble the agency spoke of problems faced by a "*potential* unit", *id.*, and of eliminating "any significant disincentive to the *prospective* unitization of properties." *Id.* (emphasis added). The TECA in *Pennzoil* recognized the solely prospective character of Section 212.75 when it described its "special provisions for *units formed after the effective date of the regulations,* including definitions of a unit and a unit BPCL, new rules concerning stripper well production and imputed crude oil." 680 F.2d at 164 n. 13 (emphasis added). Exxon itself properly understood Section 212.75 at the time it was issued to apply only to units formed after February 1, 1976. In its comments to the proposed rule which would become Section 212.75, Exxon wrote:

> Although most disincentives for units formed after February 1, 1976 have been removed by the new regulations, it is still necessary to remove the penalties and disincentives imposed by Ruling 1975-15 examples on units formed between 1973 and January 31, 1976 in order to ensure that these units are maintained in existence. These disincentives [to] past units could be removed by an addition to the proposed new regulations. This addition would apply to units formed from January 1, 1973 to January 31, 1976 and would make available to them the same measure of relief that the regulation provides for units formed on or after February 1, 1976.

PX 188, Appendix 11 at 2-3.

In sum, as the agency made clear and as Exxon understood, Section 212.75 applied prospectively only. The issue before the court, therefore, is not whether the court will heed Exxon's plea to rewrite Section 212.75, but whether that rule, with its avowed discriminatory effect of providing certain incentives for the creation of new units, while denying those benefits to existing units, should be struck down.[33]

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[33]According to Ruling 1977-2, 42 Fed.Reg. 4409 (1977), after the February 1976 amendments to the regulations were issue[illegible]wo elements determined the required manner of accounting for oil pro[illegible]on at units: the date on which the unit was formed and, more important, [illegible]e date on which enhanced recovery opera[illegible]ions began or a significant alteration in producing patterns occurred.

Although Ruling 1977-2 is not a model of clarity, three categories of units may be distilled from it. The first category consisted of all units formed before February 1, 1976, and at which enhanced recovery operations or a significant alteration in producing patterns occurred before September 1, 1976. At units in the first category a unit BPCL had to be established as of the date the significant alteration in producing patterns occurred. Only Section 212.72 applied to these units. 42 Fed.Reg. at 4415.

The Second category consisted of all units, whenever formed, at which a significant alteration in producing patterns occurred only after August 31, 1976. At units in this second category, as well, a unit BPCL had to be established as of the date the significant alteration in producing patterns occurred, but such units enjoyed all the benefits of Section 212.75. *Id.*; *see* n. 35, *infra*.

The third category consisted of units formed between February 1, 1976 and August 31, 1976 and at which either enhanced recovery operations began, or a significant alteration in producing patterns occurred prior to September 1, 1976. The agency defined "enhanced recovery" in February 1976 to include gas or liquid injection operations. 41 Fed.Reg. at 4941. The definition of significant alteration in producing patterns, which came only as of September 1, 1976, swallowed up the concept of enhanced recovery, because the new definition included "the application of extraneous energy sources by the injection of liquids or gases into the reservoir." 41 Fed.Reg. at 36,184. The agency recognized, however, that producing patterns might be altered before gas injection, and so added as an alternative definition of significant alteration "the increase of production allowables for any property that constitutes the unitized property." *Id.*

Because operators of units in this third category, formed after February 1, 1976, knew the definition of enhanced recovery when their units were formed, whereas "significant alteration" was defined only in September, the agency

As the court has already noted,[34] deference is due the FEA as "the agency entrusted by Congress to balance multiple objectives in the administration of relevant statutes," *Pennzoil Co. v. DOE, supra,* 680 F.2d at 169, and its rules must be upheld unless they are arbitrary or capricious. The FEA promulgated the February 1976 amendments to the oil price regulation, including Section 212.75, pursuant to the direction of Congress in the EPCA that it amend the regulation to provide incentives

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chose to apply the two concepts differently. Operators of units at which enhanced recovery operations began before September 1, 1976 were required to establish a unit BPCL as of the date such operations began. 42 Fed.Reg. at 4915. But operators of units at which no enhanced recovery operations began, but where a significant alteration in producing patterns occurred, before September 1, 1976, were allowed to wait until September 1, 1976 to establish a unit BPCL. *Id.*

As a practical matter this meant that if an operatior began gas or liquid injection — which would constitute both enhanced recovery and a significant alteration — the operator had to establish a unit BPCL as of that date. If there occurred only a shift in production allowables — which would constitute a significant alteration but not enhanced recovery — the operator could wait until September 1, 1976 to establish a unit BPCL.

Both kinds of units within this third category benefitted only from those provisions of Section 212.75 in effect at the time the enhanced recovery project began or the significant alteration occurred. *Id.* In other words, such units were not allowed any measure of imputed new oil, but they were allowed to use the special unit BPCL rule and the provisions for imputed stripper well oil.

In connection with its argument against retroactive application to it of the significant alterations test, Exxon complains that the FEA unlawfully discriminated by requiring operators of units formed after February 1, 1976 to establish a unit BPCL no earlier than September 1, 1976, even if a significant alteration in producing patterns occurred before that date. But the Hawkins Field Unit, under a legal obligation to establish a unit BPCL as of the date of its formation on January 1, 1975, was not similarly situated to a unit formed at a time, between February and September 1976, when the agency had expressly reserved for further comment and study the definition of the legal standard by which the obligation to calculate a unit BPCL would be established. *See* 41 Fed.Reg. at 4937. On the contrary, the agency's decision to admit this small measure of relief to those who, when they formed their units, had acted with a view to the still nebulous standard, was eminently fair.

[34]See discussion at pp. 832-33, *supra.*

for increased domestic crude oil production while at the same time maintaining firm control of crude oil prices. EPCA § 401(a). Although Congress explicitly mandated measures to spur domestic production, it underscored its concern with price control by directing that the agency could allow no increase in the price of old oil above the existing ceiling unless it expressly found that the increase would encourage enhanced recovery projects and would likely result in production greater than would have otherwise occurred. EPCA § 401(a), 15 U.S.C. § 757(b)(2); *see also* n. 9, *supra*.

Working within the narrow constraints imposed by Congress, the FEA reasonably balanced the competing aims of increased production and price control by extending the most favorable incentives to new units.[35] Indeed, the FEA could not have treated all units

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[35] To say that the agency extended the benefits of Section 212.75 to new units alone is imprecise. Units which, like the Hawkins Field Unit, were formed before February 1976, but at which, unlike the Hawkins Field Unit (see pp. 842-45, *infra*) a significant alteration in producing patterns occurred only after September 1, 1976, also could benefit from the favorable provisions of Section 212.75. *See* n. 33, *supra*. The FEA, explaining in Ruling 1977-2 the application of the significant alterations test to pre-existing units, wrote:

> All such units formed during or after 1972 were required to calculate a BPCL by aggregating the BPCL's of all the participating properties at such time as significant changes in the units' producing patterns occurred . . . If no such alteration has occurred as of September 1, 1976, determinations of upper-tier and stripper well crude oil volumes may continue to be made on a lease by lease basis until such time as a significant alteration does occur, at which time the unitized property must be treated as a single property and a unit BPCL must be established. *As of the time that a unit BPCL is established, the provisions of § 212.75 then in effect are applicable.*

41 Fed.Reg. at 4415 (emphasis added).

The agency articulated no reasons for acting so generously towards such units when its stated purpose was only to encourage prospective unitization. *See* discussion at p. _____, *supra*. One might speculate that because such units had not yet undergone a significant alteration in producing patterns, they faced a greater risk of dissolution than did units where significant and perhaps irreversible alterations had already occurred. The agency may have

alike, whenever formed. Had the FEA allowed all units, including the Hawkins Field, to benefit from the favorable provisions of Section 212.75, it would have violated the EPCA directive that no old oil be reclassified as higher-price oil unless it would not have otherwise been produced.[36] The owners of the properties comprising pre-existing units such as the Hawkins Field Unit made their economic decision to unitize and to pursue enhanced recovery efforts long before February 1976. Any further inducement to them would have produced no additional oil that they had not already decided was worth producing. They could not be encouraged to do what they had already done. As Exxon admits, "of course, since pre-February 1976 units had already been established when the imputed new and imputed stripper lease rules were promulgated, the *new rules could have had no incentive effect on the formation of these projects.*" Def.Mem. at 137 (emphasis added).

Exxon complains, however, that the benefits of Section 212.75 should have been provided to pre-existing units as well in order to prevent their dissolution. But Exxon here seeks to wage the battle it lost when Section 212.75 was promulgated. In its comments to the proposed rule, Exxon conceded that proposed Section 212.75 removed most disincentives to prospective unitization, but urged that its

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wished to provide particular incentives for the maintenance of such units by holding out the prospect of greater rewards. But whatever the agency's reasons, the issue of the reasonableness of extending the benefits of Section 212.75 to some units formed before February 1976 is not before the court. Even if it were, the court could at most strike down that small portion of Section 212.75 as an unjustifiable windfall to preexisting units. That decision would not affect the validity of the agency's decision to provide incentives for the creation of new units while denying those incentives to pre-existing units like the Hawkins Field Unit.

[36]On the other hand, had the FEA continued to treat all units as required by Ruling 1975-15, it would have violated Congress's intent to provide further incentives for increased domestic oil production — in particular, to spur unitization and enhanced recovery projects.

reach be broadened to include units formed before February 1976 "to ensure that these units are maintained in existence." PX 188, Appendix 11 at 2. The agency did in fact show its concern with the maintenance of existing units when, in its notice of proposed rule-making, it "request[ed] comments on the extent to which the establishment of a more recent BPCL will operate to maintain units in existence which were formed between 1973 and 1976." 41 Fed.Reg. at 1571. But the agency concluded, after review of the comments, that the limited incentives it provided to pre-existing units were sufficient. The extension of the revised 1975 BPCL to existing units, combined with the retroactive rescission of Ruling 1975-15, "eliminate[d] the most significant disincentives that producers had faced under the prior regulations." 41 Fed.Reg. at 4938 (1976). In refusing to go further and to extend greater benefits to pre-existing units the agency performed precisely the delicate weighing of competing statutory objectives with which Congress had entrusted it and to which judicial deference is due. Indeed, the agency could not have extended all the benefits of Section 212.75 to pre-existing units without violating the directives of the EPCA.[37] Discriminatory treatment by the FEA of prospective and existing units was therefore not arbitrary or capricious; on the contrary, it was a reasonable balanc-

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[37]The FEA's sliding scale of incentives, though complex, reasonably carried out the conflicting objectives of the EPCA. The FEA offered strong incentives — a special unit BPCL rule and provisions for imputed stripper well oil — to those considering utilization in February 1976. It added yet another incentive — imputed new oil — seven months later, for those still hesitant to unitize. It offered the least relief — a 1975 BPCL base period and the retroactive rescission of Ruling 1975-15 — to those units least in need, those formed before February 1976 and unlikely to dissolve given the participants' substantial stake in them as evidenced by a significant alteration in producing patterns having already taken place.

ing of the conflicting policy objectives of increased crude oil production and price control.

D. *Significant alteration in producing patterns*

[8] Effective September 1, 1976 the FEA defined "significant alteration in producing patterns" as "the occurrence of either (1) the application of extraneous energy sources by the injection of liquids or gases into the reservoir, or (2) the increase of production allowables for any property that constitutes the unitized property." 41 Fed.Reg. 36,172; 36,184 (1976). DOE contends that on the peculiar facts of this case, the significant alterations test affords Exxon no relief from the strict unit property rule of Ruling 1975-15, because there was both an increase in production allowables at constituent leases and gas injection at the Hawkins Field on January 1, 1975, the day the field was unitized. Exxon counters that the question of whether any alteration of producing patterns was "significant" is a question of fact, requiring expert testimony by petroleum engineers, which the court may not resolve on summary judgment. In any event, continues Exxon, no significant alteration occurred at the Hawkins Field before March 1977, when the inert gas plant began operation. In fact, according to Exxon, no truly significant alteration occurred until the injection of inert gas stabilized reservoir pressure and altered the reservoir's underground drive mechanisms, sometime in 1979.

In effect, Exxon condemns the definition of significant alteration as too harsh and inflexible and again invites the court to rewrite the regulation in Exxon's favor. But again Exxon miscasts the issue. Although the court may reasonably interpret any ambiguity which might arise from application of the regulation, the court is without power to substitute its own or Exxon's ideas as to how the agency should have defined significant alteration in pro-

ducing patterns. At most, the court could invalidate the rule if it were fatally inconsistent with applicable statutes.

But it is not. Rather than rely on hard to decipher underground phenomena, the agency based its definition on events readily observable by agency auditors. This clear, easily administered test was not only consistent with, but was required by, applicable statutes. In the EPCA the Congress directed the FEA, in drafting the February 1976 amendments, to establish standards that, while balancing the goals of price control and production incentives, would be readily enforceable. Congress required the agency to determine that the classifications of oil it would establish were "administratively feasible." EPCA § 401(a); 15 U.S.C. § 757(b)(1)(A). The term "administratively feasible", according to the Conference Committee, meant "a workable pricing program which is both fully enforceable under section 5 and compatible with achieving the policy objectives set forth in Section 4(b)(1) of the Emergency Petroleum Allocation Act." S.Rep. No. 516, 94th Cong., 1st Sess. 191 (1975), U.S.Code Cong. & Admin.News, p. 2033.

The comments the agency considered when it devised the significant alteration test "indicated the difficulty associated with attempting to develop a workable standard for determining the point at which production patterns have been significantly altered." 41 Fed.Reg. at 36,181. Proposals ranged broadly, including requiring a unit BPCL as of the date of unitization, allowing producers the option to continue lease-by-lease accounting until injection occurred, allowing the option for two years, or finally, allowing the option indefinitely. *Id.* The definition the agency finally settled on was designed to enable the agency adequately to police the oil industry to ensure effective price control, while at the same time affording

"maximum flexibility to producers seeking to form and maintain unitized properties," *id.* at 36,182, in order to remove the disincentives to unitization targeted by the EPCA.

Agency emphasis upon administrable standards, demanded by Congress, has consistently been upheld by the TECA. For example, in *Sauder v. DOE, supra,* 648 F.2d 1341, Congress directed the FEA, in drafting the stripper well exemption, to provide appropriate limitations to the definition of the exempt stripper lease "to insure that an administratively workable system is established which does not permit abuse." *Id.* at 1346. quoting H.R.Rep. No. 624, 93d Cong., 1st Sess. 31 (1973), U.S.Code Cong. & Admin.News, p. 2533; *see also In re DOE Stripper Well Exemption Litigation, supra,* 690 F.2d at 1387. Without a formal unitization agreement, Sauder and five other working interest owners cooperatively produced oil from three separate properties overlaying a single reservoir. Alleging a *de facto* unitization, Sauder claimed the stripper well exemption for production from all three properties. Treating the properties separately, the DOE disallowed the claim for two of the three. The court upheld the agency's insistence on a formal unitization agreement as "consistent with Congress' direction that the agency devise 'an administratively workable system' that avoids abuse of the exemption, and does not exceed the agency's authority." 648 F.2d at 1346. The court explained: "Equitable pricing is one of the important objectives of the EPAA, 'and this objective cannot be bogged down in an administrative quagmire.' " *Id.* at 1348, quoting *Tenneco Oil Co. v. Federal Power Commission,* 442 F.2d 489, 497 (5th Cir.1971).

Similarly here, the agency's decision to define significant alteration in producing patterns in terms of easily observable events is consistent with the intent of Con-

gress that administration of price controls be workable and effective. The FEA with its limited resources could not afford to satisfy Exxon's desire that the agency send droves of petroleum engineers to the Hawkins Field to conduct elaborate tests to examine the field's underground drive mechanism. That is precisely the "quagmire" that the agency had to avoid. The agency described its limitations in another context, when it explained its initial rejection of the proposal that separate reservoirs underlying a single tract be treated as separate "properties" for purposes of accounting for upper and lower-tier oil production.

> [T]he January 8 proposal was not adopted primarily because FEA concluded that it would be infeasible to attempt to administer a program under which FEA could not require easily understandable records from which could be determined the limits of each producing property. FEA has neither the expertise nor the resources required to monitor reservoir-by-reservoir production, and FEA auditors would not have at their disposal adequate means to confirm or deny that production had in fact resulted from two or more separate and distinct producing reservoirs.

41 Fed.Reg. at 36,179. Neither did the FEA have the expertise or resources to judge significant alterations in producing patterns of unitized properties on any basis other than easily observable events.

Even Exxon recognized the value of ease of administration. Commenting on the above-mentioned proposal that separate reservoirs be considered separate properties, Exxon wrote: "We recognize the need for FEA to develop regulations that can be audited." PX 217 at 6. More to the point, Exxon recognized the need for agency standards based on objective criteria, and not dependent for their enforcement on extensive subjective evaluation. A propo-

sal to limit certain incentives to "bona fide" enhanced recovery units met the rebuke from Exxon that "once a definition is developed, it will present severe administrative problems in certifying and auditing upper-tier production. These problems would make the system very difficult and expensive to administer on the part of both FEA and producing companies." PX 188, Appendix 3 at 2. Complaining that "[t]here is considerable evidence that the current regulations in total are not administratively workable," Exxon suggested that "[r]egulations should rely on precise definitions rather than on a requirement for administrative judgment." *Id.*, Appendix 2 at 1.

Indeed, although Exxon now invites the court to substitute just such a subjective test based on administrative judgment, Exxon obviously understood the standard as the agency intended when the test was announced, because Exxon calculated a unit BPCL at the Hawkins Field beginning September 1, 1976 — long before the changes in underground pressure or drive mechanism Exxon would like this court to rely on. As Exxon attorney Fred File then concluded unequivocally: "Inasmuch as the Hawkins unit cannot meet the new tests permitting tract-by-tract computations, it is clear that after September 1, 1976 tract-by-tract computations will no longer be permitted. . . . It is clear that the new regulations require computation of upper and lower tier oil at Hawkins on a unit basis after September 1, 1976." PX 236 at 3, 4 (Memorandum from Fred W. File to Fred M. Perkins, October 1, 1976).

Ironically, in drafting the definition of significant alteration in producing patterns, the FEA heeded Exxon's advice that it rely on precise definitions rather than administrative judgment. One might speculate about other standards, not substantially harder to administer,

whose effect would have been to allow greater relief to the Hawkins Field, where interim gas injection, transfer of production allowables and unitization happened to coincide.[38] But "[t]o be upheld, the action taken by the FEA need not be the same as the court or the appellee might have taken in correcting the problems occurring as a result of the energy crisis and the impact of earlier

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[38]In Ruling 1977-2, the FEA said it would, "on a case by case basis, permit unit operators to justify the establishment of the date of significant alteration in producing patterns in [pre-existing] units on reasonable bases other than those specified by the present definition." 41 Fed.Reg. at 4415. But Exxon has never proffered any alternative basis to the agency, contending instead that the agency's purported relaxation of enforcement policy is invalid and that only Section 212.75 applies to it. Consequently, the question of what might be a reasonable alternative basis to justify the establishment of the date of significant alteration is not before the court. However, Exxon's suggestion to this court that a significant alteration be determined on the basis of changes in the field's underground drive mechanism is not such a reasonable alternative basis. Even case by case determinations must be workable, and doubtless few petroleum engineers would agree on the amorphous "significance" of voluminous data on geological transformations. For the same reason, it would serve no purpose for this court to hear the "expert" testimony Exxon would offer. As Exxon itself vigorously asserts, "significant alteration" was not a term of art in the oil industry, but was, in Exxon's words, "cut from whole cloth" by the agency. *See* Def.Mem. at 61-62. Accordingly, it would be futile for the court to hear petroleum engineers testify as to a legal conclusion they have no expertise to make: what alterations in producing patterns were "significant."

Exxon's argument that a trial is necessary to resolve conflicting factual contentions as to when a significant alteration in producing patterns occurred is mistaken. As the TECA wrote in *Grigsby v. DOE*, *supra*, 585 F.2d at 1079, " '[t]o preclude summary judgment the disputed facts must be material and must affect the outcome of the litigation.' " Grigsby had argued that he should be allowed to establish that his second well had been drilled on a different lease within the unit. *See* p. 833, *supra*. The TECA found that fact immaterial, because Grigsby's unitized property had to be treated as one property even if the second well had been drilled on a different lease within the unit. 585 F.2d at 1079 n. 17. In the same manner, Exxon's insistence that it be allowed to establish that the Hawkins Field underground drive mechanism was not altered until sometime in 1979 is irrelevant. As a matter of law, a significant alteration occurred when there was either a transfer of production allowables among leases within the unit or gas injection, regardless of when the field's drive mechanism was transformed. Accordingly, there exists no genuine dispute as to issues of material fact and summary judgment is appropriate.

regulations, so long as the action taken is reasonable." *Pasco v. FEA, supra*, 525 F.2d at 1400. Gas injection and transfer of production allowables among constituent properties are events commonly associated with shifts in oil production across lease lines. To allow lease-by-lease accounting to continue after such shifts would have enabled unit operators to circumvent oil price controls. To require the agency to adopt a subjective test based on complex geological phenomena would have plunged the agency into an administrative quagmire which would have had the same result. The agency definition of significant alteration was a reasonable effort by the agency to fulfill its "duty to reasonably inhibit gerrymandering of boundaries undertaken to avoid price controls." *Pennzoil Co. v. DOE, supra*, 680 F.2d at 169. Accordingly, it must be upheld.[39]

[9] It was clear to Exxon as of September 1, 1976 that the producing patterns at the Hawkins Field had been significantly altered because it was clear as of that date that Exxon had transferred production allowables among

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[39]Exxon's barrage of attacks on the agency's amendments to the regulations in February and September 1976 — decrying their retroactive application, their discriminatory effect, and the rigor of their standards — is puzzling. If the court were to uphold Exxon's challenges, at most the court could invalidate all or part of Section 212.75 and the significant alterations test as applied to pre-existing units. But that would not leave a vacuum. Instead, there would remain to apply to the Hawkins Field Unit only Section 212.72, unembellished by either Ruling 1975-15 (rescinded *ab initio*) or by the significant alterations test. But the TECA has held in the *Pennzoil* case that implicit in the property regulation itself is the unit property rule, the requirement that a unit BPCL be calculated as of the date of unitization. 680 F.2d at 176. Consequently, if Exxon's attacks were to succeed, it would still find itself in the position it is trying to escape. Exxon apparently seeks the best of all possible worlds. It would like the court to uphold the rescission of Ruling 1975-15 and to rewrite the rule which replaced it to suit Exxon's practices at the Hawkins Field, in effect leaving it free of any rule at all. The 1976 amendments to the oil price regulations cannot reasonably be read that way.

constituent leases and that it was injecting gas.[40] And both had in fact occurred on the day the Hawkins Field became a unit, on January 1, 1975.

Prior to unitization the Texas Railroad Commission ("TRRC") limited the number of barrels of oil — called production "allowables" — each well within the Hawkins Field could produce. When a producer shut in an unproductive well, under TRRC orders that well's allowables were transferred pro rata among all the other wells in the field. In its order approving the unitization of the Hawkins Field, the TRRC granted the field a unit allowable and in doing so relinquished to Exxon the control of allocating production among the properties comprising the unit. DX Intro 2. The unit allowable permitted Exxon to transfer production from lease to lease at will, without regard to prior limits on production at any lease, provided total unit production did not exceed the unit allowable. In effect, therefore, the TRRC accorded Exxon as of January 1, 1975 an increase in production allowables for any property within the Hawkins Field Unit to which Exxon chose to transfer production, and thereby triggered a significant alteration in producing patterns as of January 1, 1975.

Exxon did not wait to take advantage of its new-found freedom as unit operator. In January 1975 Exxon boosted production above prior allowables by almost 320,000 barrels at 65 leases — roughly 10 percent of total unit production at one-quarter of the unit's properties. *See* Plaintiff's Appendix of Charts and Graphs, C-1a. At the

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[40] Exxon in fact understood the regulation to require unit-wide accounting much earlier. Interpreting the September 1976 amendments to the regulations, including the definition of significant alteration, one Exxon manager wrote: "This exception is of no benefit to Hawkins because of the transfer of allowables provisions. It appears that this regulation will require that Hawkins begin unit calculations on February 1, 1975." PX 231 at 5. (Memorandum from H.T. Wright to S.W. Abel, August 23, 1976).

same time, production declined by almost an equal amount at 137 other leases. *Id.* at C-lb. Production shifts of increasing magnitude continued throughout the early months of 1975.[41] By shifting production within the unit at will, with only an eye to the unit allowable limit, Exxon effectively "transfer[red] production allowables among participating leases." *See* 41 Fed.Reg. at 36,182.[42]

Meanwhile, after unitization Exxon continued — and increased — the injections of natural gas it had begun in 1970. Even if Exxon had only continued to inject natural gas at the rate it had done so before unitization — or even some lesser rate — it would have engaged in "the application of extraneous energy sources by the injection of liquids or gases into the reservoir" — itself a significant

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[41]The figures concerning transfer of production allowables among constituent properties in the first five months of 1975 appear below. *See* Plaintiff's Appendix of Charts and Graphs, C.

Month (1975)	Number of leases at which production increased above prior allowable	Increase in production (barrels)	Number of leases at which production decreased	Decrease in production (barrels)
Jan.	65	319,654	137	294,536
Feb.	56	316,027	145	320,711
March	51	442,878	150	417,553
April	45	441,548	153	446,447
May	53	546,959	148	540,503

[42]Exxon's own measurements and analysis of production shifts at the Hawkins Field show the dramatic changes that occurred in 1975. Studying the question only days after the February 1976 amendments were issued, Exxon engineer L.D. Carlson concluded that almost 20 percent of 1975 production had shifted across lease lines, almost two and one-half times as much as had shifted in either 1974 or 1973. PX 200 (February 6, 1976).

Two other Exxon engineers were assigned the task in mid-1975 to determine why volumes of "Phase IV" or new oil at the Hawkins Field had exceeded earlier forecasts. They concluded that, of the excess, "[a]pproximately 21.2 MB/D is due to *the redistribution of production on Exxon-operated leases.* Formation of the unit has enabled us to reduce production from those leases with high gas-oil or water-oil ratios. *This results in increased production from those leases in the flush part of the field and correspondingly their Phase IV volumes.*" PX 126 at 1 (Report by L.D. Roeder and J.B. Holmes, June 20, 1975) (emphasis added).

alteration in producing patterns. 41 Fed.Reg. at 36,184.[43] But Exxon in fact substantially increased gas injection after unitization. In its 1969 approval of Exxon's interim plan, the TRRC authorized the injection of an average of 20 million cubic feet of natural gas per day. But when it approved the unitization of the Hawkins Field, the TRRC removed that limit. Accordingly, Exxon injected 28.2 mcf per day in January 1975 — 40 percent more than a year earlier. PX 177. Indeed, Exxon increased injections thereafter until by the fall of 1975 it was injecting more than twice as much gas as a year before. *Id.* Over all, in the first ten months of 1975 Exxon injected an average 36.5 mcf per day — almost an eighty percent increase over the same period in 1974. *Id.* Comparing totals for the years 1972 through 1975 reveals the same clear jump after unitization. Although between 1972 and 1975 increases averaged only 5 percent annually, total gas injections at the Hawkins Field in 1975 leaped 82 percent, from 7,652,916 mcf in 1974 to 13,945,000 mcf in 1975, with the 1975 total more than double the amount for 1972. *See* PX 210 at 2, 5; PX 109 at 2.[44]

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[43]Exxon argues that its re-injection into the Hawkins Field of natural gas taken from the field was outside the definition because the gas was not an "extraneous" energy source. *See* Def.Opp. at 182-83. The FEA made clear, however, in the preamble to the February 1976 amendments, that "extraneous" included gas recycled from the reservoir itself. The agency explained:

> In response to the proposed definition, many comments expressed concern that the language "from extraneous sources" might preclude some types of enhanced recovery projects that recycle reservoir gas .... The fact that the injected fluids or gases may have originated in the reservoir is irrelevant as long as they are injected by an extraneous energy source.

41 Fed.Reg. at 4938.

[44]Total annual gas injections at the Hawkins Field from 1972 to 1975 were as follows:

Accordingly, under either prong of the regulatory definition — an increase in production allowables at any constituent property, or gas injection — a significant alteration in producing patterns occurred at the Hawkins Field on January 1, 1975, and on that date Exxon's obligation to calculate a unit BPCL and to account for oil production at the Hawkins Field on a unit-wide basis accrued.

III. *Estoppel*

[10] Exxon argues that the government is estopped from now challenging the legality of Exxon's lease-by-lease accounting practices at the Hawkins Field Unit. According to Exxon, the decision by it and the other Hawkins Field interest owners to unitize, as well as the decision to establish and maintain the practice of accounting for new and old oil production on an individual lease basis, were both made in reasonable reliance on repeated agency assurances to Exxon and others that such practices were allowable under the regulations. DOE replies that as a matter of law the government may never be estopped on the basis of unauthorized statements by government officials. In any event, DOE continues, Exxon cannot prove reasonable reliance, an essential element of the estoppel defense.

[11] Exxon's estoppel defense must fail because the undisputed facts in this case demonstrate that Exxon's reliance, if any, on unauthorized informal statements by agency employees, was not reasonable. To begin with,

Year	Total (mcf)
1975	13,945,000
1974	7,652,916
1973	7,229,119
1972	6,897,093

See PX 210 at 2, 5; PX 109 at 2.

Exxon can point to no agency pronouncement prior to January 1, 1975, the date by which Exxon obviously had made its decision to apply lease-by-lease accounting, directed to Exxon or to the oil industry generally, which condoned such accounting practices. Instead, Exxon cites meetings held by James Langdon, Associate Assistant Administrator of the FEA, in March 1974 with Austral Oil Company and in July 1974 with Pennzoil Company, at which Langdon reportedly stated that no formal, written agency interpretations of the property regulation would be forthcoming, but that lease-by-lease accounting was acceptable. Exxon asserts both Austral and Pennzoil immediately informed it of the substance of Langdon's remarks, which formed the basis for its decision to alter its prior practices and adopt individual lease accounting at the Hawkins Field. But the second-hand recounting of remarks by an agency employee cannot support a defense of estoppel. The party to be estopped must have intended that his assertions be acted upon by the party raising the defense, or must act so that that party could reasonably believe it is so intended. *United States v. Ruby Co.*, 588 F.2d 697, 703 (9th Cir.1978), *cert. denied*, 442 U.S. 917, 99 S.Ct. 2838, 61 L.Ed.2d 284 (1979). Even assuming *arguendo* that Langdon's views might be considered official and binding on the agency, he cannot have intended or understood that in speaking with Austral and Pennzoil he would lead Exxon astray.

Admittedly, certain agency employees did later make statements, directly to Exxon or to the industry generally, which could be interpreted as condoning lease-by-lease accounting. For example, in February 1975 Langdon[45] delivered a paper at a conference in which he

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[45]Statements by Mr. Langdon were also the cornerstone of the estoppel defense raised by Pennzoil. *See Pennzoil Co. v. DOE*, *supra*, 680 F.2d at 166. The TECA in *Pennzoil* on strikingly similar facts to those before this court declined to estop the government, writing that "[t]here is simply no basis in

illustrated his explanation of the effect of the regulations with an example plainly implying that lease-by-lease accounting was proper.[46] But Langdon's paper, the earliest direct statement cited by Exxon, came only long after the decision to apply lease-by-lease accounting at the Hawkins Field had been made, and therefore cannot have been a basis for that decision. Nor could Exxon reasonably rely on that statement, or others like it, as a basis for what it describes as its ongoing decision to maintain lease-by-lease accounting, for Exxon conveniently ignored a flurry of contemporaneous agency pronouncements to the contrary. Most important of these, as noted by TECA in *Pennzoil Co. v. DOE, supra*, 680 F.2d at 171, were the five official Interpretations issued by the FEA Office of General Counsel in the months preceding Ruling 1975-15 which reiterated the rule that a unit be treated as a single property. And Ruling 1975-15 itself completely dispelled any confusion Exxon may have had as to the regulations' meaning. Nevertheless, Exxon doggedly persisted, even in the face of the pellucid dictates of Ruling 1975-15, in applying individual lease accounting at the Hawkins Field.[47] Surely a regulated party as sophisticated as Exxon which ignores the only existing official pronouncements cannot be said to be reasonable when it follows

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the circumstances of the present case to find unreasonableness, unfairness, or any other element of estoppel in applying the agency interpretation to the relevant period in question here." *Id.* at 176. That court added, moreover, that "The 'interpretations given by an individual member of a Board or by its attorney is not, we think, to be taken as that official kind of interpretation to which courts must pay attention.' It is 'absurd' to rely upon the unsupported opinions of agency staff attorneys when trying to divine the meaning of a regulation." *Id.* at 161-62 n. 8 (citations omitted).

[46]*See* J. Langdon, FEA Price Controls on Crude Oil and Refined Petroleum Products, 26 Annual Oil & Gas Institute of the Southwestern Legal Foundation 55, 66 (1975).

[47]Not even Pennzoil, the direct recipient of Langdon's purported assurances in July 1974, ventured to follow Exxon's course in ignoring Ruling 1975-15, but instead applied a unit BPCL at its Walker Creek Unit as of September 1, 1975. *See Pennzoil Co. v. DOE, supra*, 680 F.2d at 160.

instead those unauthorized views of agency employees ferretted out by Exxon which happen to coincide with Exxon's self-interest. The expression of those views should at most have served to raise a question in the minds of Exxon managers; in no event could those managers reasonably rely thereon, given the weight of official opinion to the contrary. The unauthorized statements contrary to official agency pronouncements had neither the force nor the tenor which could give Exxon solace, but were instead, in the words of Judge Jameson in *Pennzoil*, "an invitation to seek advice and a warning that if it did not do so it was proceeding at its own peril." 680 F.2d at 181 (Jameson, J., concurring). As Exxon well knew, only an official interpretation could provide it with the assurance it supposedly sought. *Id.* at 179. But Exxon chose never even to seek an official written interpretation. Though Exxon now insists that such a request would have been futile, its studied inaction at that critical time of its purported confusion belies any claim of reasonable reliance. Exxon, like Pennzoil, "knowingly proceeded at its own peril when it relied on conflicting informal opinions it received as to the proper interpretation of § 212.72." *Id.* at 182 (Jameson, J. concurring).[48]

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[48]Further evidence that Exxon could not reasonably feel reassured is found in Exxon's felt need to return to the agency again and again in the wake of Ruling 1975-15 to push for clarification or modification of its then clear legal obligation to treat the Hawkins Field as a single property. *See* Def.Opp. at 30-46, 49-61. Had Exxon already obtained the kinds of assurances which might support a claim of reasonable reliance, it would not have needed to return to the agency with such frequent inquiries and comments, all the while refusing, however, to ask for a formal written interpretation. But of course Exxon obtained no such assurances in the tumultuous months following Ruling 1975-15. As Exxon itself describes, it was "pushing [DOE officials] not only to say they didn't take exception to what we were doing, but to come out with new regulations that would clearly spell out what we were doing was in accordance with the regs." File Dep. at 127. But Exxon came away each time unsatisfied: it was "distressed with the slowness in which they failed to respond." *Id.*

[12] Finally, even if Exxon were able to demonstrate reasonable reliance this would still not be a proper case in which to invoke estoppel of the government. DOE correctly states the longstanding principle that the courts look with extreme disfavor upon estoppel of the government on the basis of unauthorized statements by its employees. *See, e.g., Goldberg v. Weinberger*, 546 F.2d 477, 481 (2d Cir.1976) ("The government could scarcely function if it were bound by its employees' unauthorized representations."). To be sure, that rule is no longer so hard and fast as DOE portrays it. Dicta in a few Supreme Court cases[49] have led courts in some circuits to erode

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Indeed, Exxon's internal memoranda from that time show that the agency was at most noncommittal in its responses to Exxon's repeated requests. Agency personnel were "completely unsympathetic" to Exxon's plight. PX 159 (Memorandum from M. Krause, Jr. to files, Nov. 4, 1975). FEA counsel reportedly did not take exception to Exxon's accounting practices, "but at the same time, they did not endorse such action." PX 169 at 3 (Memorandum from Fred W. File to Exxon Price and Wage Coordination Committee, Price Subcommittee, Nov. 26, 1975). When "pressed . . . for specifics", FEA officials were "vague on details as to how new oil could be calculated in units like Hawkins." PX 180 (Memorandum from Fred W. File to O.L. Luper, Dec. 31, 1975). Fred File concluded that Exxon could continue to make payments to royalty owners based on lease-by-lease accounting, but cautioned that "there is a risk that this method may result in a disallowance of costs and a problem in effecting recovery of overpayments to third parties." PX 153 (Memorandum from Fred W. File to Exxon Price and Wage Coordination Committee, Price Subcommittee, Oct. 30, 1975). That risk lingered even after the September 1976 amendments to the regulations, when Mr. File wrote that "all doubts as to the proper method of computation before September 1, 1976 have not been removed" despite the fact that Peter Luedtke, FEA staff attorney, "did not take any exception to my interpretation and that it is his understanding that prior to September 1, 1976 upper tier oil may be computed on a tract-by-tract basis, provided the unit meets the test of the prior regulations relating to implementation of enhanced recovery techniques and significant alteration of producing patterns." The risk lingered because "while Mr. Luedtke agrees with my interpretation of the August 20, 1976 clarifications as applied to Hawkins, *his views are not official FEA interpretations.*" PX 236 at 4 (Memorandum from Fred W. File to Fred M. Perkins, October 1, 1976) (emphasis added).

[49] *Schweiker v. Hansen*, 450 U.S. 785, 788, 101 S.Ct. 1468, 1470, 67 L.Ed.2d 685 (1981) ("This court has never decided what type of conduct by a government employee will estop the government from insisting upon compliance with valid regulations governing the distribution of welfare benefits.");

that principle somewhat and, in certain limited circumstances, to allow the government to be estopped.[50] But even those courts which have gone furthest in limiting the traditional rule have recognized that a court should estop the government from exercising its sovereign functions with great reluctance, and only if, after proof of the requisite factual elements, the court finds that on balance the injury to the private party in the absence of estoppel would be so egregious as to outweigh the public interest in the enforcement of the law. For example, the Ninth Circuit wrote in *United States v. Lazy FC Ranch*, 481 F.2d 985, 989 (9th Cir.1973) that "although we may be more reluctant to estop the government when it is acting in [its sovereign] capacity," nevertheless "estoppel is available as a defense against the government if the government's wrongful conduct threatens to work a serious injustice

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Montana v. Kennedy, 366 U.S. 308, 315, 81 S.Ct. 1336, 1341, 6 L.Ed.2d 313 (1961) ("[W]e need not stop to inquire whether, as some lower courts have held, there may be circumstances in which the United States is estopped to deny citizenship because of conduct of its officials."). Interestingly, the Court in *Schweiker v. Hansen* declined to estop the government from denying Social Security benefits to an applicant who had been misinformed by a government agent, writing that "at worst, [the agent's] conduct did not cause respondent to take action, or fail to take action, that respondent could not correct at any time." 450 U.S. at 789, 101 S.Ct. at 1471 (citations omitted). So, too, could Exxon have corrected its accounting practices at the Hawkins Field at any time.

[50] *See, e.g., Portmann v. United States*, 674 F.2d 1155 (7th Cir.1982); *Santiago v. Immigration and Naturalization Service*, 526 F.2d 488 (9th Cir.1975); *United States v. Lazy FC Ranch*, 481 F.2d 985 (9th Cir.1973); *cf. Investors Research Corp. v. SEC*, 628 F.2d 168, 174 n. 34 (D.C.Cir.1980) ("The fundamental principle of equitable estoppel applies to government agencies, as well as private parties.") Courts have employed various devices to get around the traditional rule, such as by distinguishing between offensive and defensive estoppel, or between proprietary and sovereign functions of the government, or by adding an additional prerequisite that the government engage in "affirmative misconduct." *See* Note, Equitable Estoppel of the Government, 79 Colum.L.Rev. 551, 555 (1979) and cases cited therein. Some courts have abandoned the device of categorical exceptions to the traditional rule and have held, in simple but opaque language, that "the estoppel doctrine is applicable to the United States where justice and fair play require it." *United States v. Lazy FC Ranch*, *supra* at 988.

and if the public's interest would not be unduly damaged by the imposition of estoppel." Other courts have held that, in deciding whether to estop the government, courts must consider, in addition to the five traditional elements of estoppel, the type of government activity being pursued and the danger of undermining important federal interests if estoppel were imposed, *Portmann v. United States*, 674 F.2d 1155, 1167 (7th Cir.1982) or, stated differently, courts must "balance the equities in each individual case." *Santiago v. Immigration and Naturalization Service*, 526 F.2d 488, 494 (9th Cir.1975) (Choy, J., concurring and dissenting). Even applying these most liberal standards, the balance weighs against Exxon. The government's case against Exxon is a major effort to enforce urgent Congressional mandates to pursue the important national policy objectives of controlling domestic crude oil prices. To estop the DOE would not only frustrate those important objectives but would allow Exxon unjustly to reap huge profits from its dubious exploration of the limits of regulatory tolerance. As the TCA described Pennzoil, Exxon was

> hardly an innocent abroad interpreting in the midst of confusing babble a direction sign labeled in a foreign language. It was an experienced traveler on familiar terrain perceptively advised by its own counsel in its own interest, and deviating from the plainly indicated direction it had theretofore followed.

680 F.2d at 179. As that same court noted, in much more sympathetic cases of impoverished Social Security claimants misled by the unequivocal misstatements of government agents, and thereby deprived of essential benefits, the Supreme Court has declined to allow estoppel against the government. *Id.* at 176–77. *A fortiori*, estoppel may not lie in this case "in favor of sophisticated oil operators exploring the possibility of dubious regulatory leeway

without even requesting an official interpretation" *Id.* at 177.

IV. *Remedy*

[13] The court has held that Exxon's obligation to establish a unit BPCL and to account on a unit-wide basis for upper and lower tier oil production at the Hawkins Field accrued on January 1, 1975. It remains for the court to determine the amount of the overcharges and to fashion an equitable remedy.

Section 209 of the Economic Stabilization Act, 12 U.S.C. § 1904 note, incorporated in Section 5(a)(1) of the EPAA, calls for violators of the oil price regulations to make restitution of overcharges. By comparing Exxon's actual accounting practices at the Hawkins Field with those Exxon should have applied, DOE has calculated the total overcharges by Exxon between January 1, 1975 and January 27, 1981, when oil prices were decontrolled, in the amount of over $895 million. DOE insists that Exxon, which owned about two-thirds of the field's production, was the driving force which controlled production and accounting practices at the Hawkins Field Unit and should therefore be held responsible for all the overcharges. Reimbursement of the overcharges to purchasers of Exxon's improperly classified crude oil is impracticable, according to DOE. Due to the pervasive reach of oil price regulation at the time these overcharges occurred, DOE contends that the overcharges worked their way throughout the economy nationwide to the millions of ultimate consumers of petroleum products. Any attempt to determine actual injury to particular purchasers would be impossibly complicated. Consequently, DOE asks the court instead to order payment of the amount of overcharges, with interest, into the United States Treasury. Finally, in order to deter future regula-

tory violations, DOE asks the court to assess civil penalties against Exxon in the amount of $38.27 million.

A. *Restitution*

Exxon vigorously contests the government's proposed remedy. Disputing its role as the animating force at the Hawkins Field, Exxon argues that under the terms of the Unit Agreement each Hawkins Field interest owner takes its share of production in kind and independently determines the price at which to sell the oil. Exxon's description of itself as just another interest owner is disingenuous. Exxon was the prime mover and annimating force behind the formation and operation of the Hawkins Field Unit and, under the rule of *Sauder v. DOE, supra,* 648 F.2d 1341, Exxon may be held responsible for all overcharges at the field.

In *Sauder* plaintiff owned a 34 percent and 41 percent interest, respectively, in two properties whose production he improperly claimed to be exempt stripper well oil. Sauder's was by far the largest single holding of the six working interest owners. He was the sole operator of the leases and it was he who improperly certified to purchasers that the production was exempt stripper oil. The TECA found that Sauder was the "animating force" behind production from the leases and could therefore "fairly be said [to have] caused the overcharges." *Id.* at 1347. The TECA held that, in those circumstances, it was within the discretion of the district court to hold Sauder liable for the full amount of the overcharges. *Id.* at 1347–48. To require the agency to seek refunds from each individual owner, the court reasoned, would create intolerable administrative obstacles to enforcement of price controls. *Id.* at 1348.

In stating its rationale of administrative workability, the *Sauder* court relied on *Tenneco Oil Co. v. Federal*

Power Commission, 442 F.2d 489 (5th Cir.1971), where the Fifth Circuit upheld a Federal Power Commission order requiring Tenneco to refund all excess charges for natural gas made to Tenneco as well as to Tenneco's six co-owners or predecessors in interest at a particular field. The TECA in *Sauder* explained that the Fifth Circuit's reasoning, "to hold the central figure responsible for refunding the overcharges is necessary to effective enforcement," applied equally to violations of the crude oil price regulations. 648 F.2d at 1348. The *Sauder* court wrote: "Equitable pricing is one of the important objectives of the Emergency Petroleum Allocation Act, 'and this objective cannot be bogged down in an administrative quagmire.' " *Id.*, quoting *Tenneco Oil Co. v. Federal Power Commission, supra,* 442 F.2d at 497.

Moreover, the TECA in *Sauder* found, shifting the burden to a central figure such as Sauder aided in the task of enforcement without working any unfairness against him. 648 F.2d at 1348. To the extent that other interest owners had shared the illegal profits, the court suggested Sauder could recover from them by applying their share of future lease revenue to repayment of the overcharges. *Id.* at 1349.

The factual basis for holding Exxon responsible for the full amount of the overcharges at the Hawkins Field is even stronger than in *Sauder*. Throughout the relevant period Exxon's working interest at Hawkins ranged between 76 and 80 percent; its share of unit production, when including royalty interest owners, was about two-thirds. PX 92 at 1-2; PX 108 at 31. Exxon was the animating force behind formation of the Hawkins Field Unit, having begun to promote it as early as 1969 Def.Opp. at 6. Exxon sought and received permission in 1969 to inject natural gas into the field, which it began the following year. PX 4 at 4. Exxon was the animating force

behind operation of the unit. The Unit Agreement named Exxon sole operator. DX Intro–4. As operator, Exxon chose the wells to shut-in, the wells where production was to go up or down, where to inject gas, and how much. PX 94; PX 121. Most important, Exxon decided how the unit would account for upper and lower tier oil, first in 1974, before the field was legally unitized, PX 85 at 11, later after Ruling 1975–15 was issued, PX 145, and finally when it switched to a unit BPCL under Section 212.75 in September 1976. PX 141.[51] Accordingly, Exxon may "fairly be said [to have] caused the overcharges." *Sauder v. DOE, supra,* 648 F.2d at 1347.

Moreover, the administrative burden of requiring the agency to recover funds from each of the Hawkins Field Unit owners would be many times the burden found intolerable in *Sauder* or *Tenneco.* In contrast to the handful of working interest owners in those two cases, there are more than 200 working interest owners at the Hawkins Field, in addition to the more than 2200 royalty interest owners. To force the agency to act against each individually would plunge the agency into an "administra-

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[51]At a meeting of interest owners on September 10, 1974 in reply to a question "as to how the Operator planned to account for new, released and stripper oil", an Exxon representative outlined Exxon's plans to account for production on a lease by lease basis to determine total unit production in each category, but to allocate volumes of new, released and stripper oil to each tract pro rata, based on tract participation. PX 85 at 11 (Minutes of meeting of Exxon interest owners, September 10, 1974).

After Ruling 1975–15 was issued, Exxon simply informed royalty interest owners that "Exxon has elected to compute exempt oil as it did before the ruling was issued." PX 145 (Letter from Exxon to Hawkins Field interest owners, Oct. 20, 1975).

Similarly, after the September 1976 amendments to the oil price regulations Exxon peremptorily informed other interest owners that in accordance with the new rule, "[w]e have . . . established a single base production control level for the Hawkins Field Unit based on old oil produced and sold during the twelve-month period from September 1, 1975 through August 31, 1976." PX 241 (Letter from Exxon to Hawkins Field interest owners, Oct. 20, 1976).

tive quagmire" which would effectively block enforcement of oil price controls at the Hawkins Field.

Finally, Exxon, like Sauder, is not without recourse against the other interest owners, and so imposing full responsibility on Exxon will aid in enforcement of price controls without unfairness to Exxon. When Exxon decided to continue lease-by-lease accounting at the Hawkins Field in the face of Ruling 1975-15, it sought to protect itself by including with its mailing of royalty checks the following warning:

> Since FEA regulations prohibit producers from charging or purchasers from paying more than the lawful price for old oil, Exxon must advise you that royalty and other interest owners in the unit may be required to refund excess amounts received for oil heretofore classified as "new crude oil" which the FEA may rule does not qualify for exempt pricing.

PX 145 (Letter from Exxon to Hawkins Field interest owners, October 20, 1975). A few months later, weighing the pros and cons of Exxon's decision to continue lease-by-lease accounting, one Exxon manager noted reassuringly:

> Potential losses via overpayments of working and royalty interest owners are minimal since most of these are financially responsible parties, and all payments are backed by reserves.

PX 172 at 2 (Memorandum from O.R. Harrison to C.M. Harrison, Dec. 15, 1975). Similarly, after the DOE issued a Notice of Probable Violation in January 1978, Exxon again warned interest owners:

> [I]f a remedial order . . . should be received, it will probably be necessary for Exxon, pending the outcome of the controversy, to: (a) reduce payments for future production and set up an escrow account for

> that portion of the settlements in dispute and (b) take action with respect to alleged past overpayments as may be necessary to comply with the remedial order.

PX 246 at 2 (Letter from Exxon to Hawkins Field interest owners, January 26, 1978). Should Exxon turn to the other Hawkins Field interest owners for contribution or indemnification Exxon, like Sauder, could attempt to deduct the other interest owners' share of the overcharges from future royalty payments.[52]

Exxon attempts to escape liability for the overcharges by arguing first that the oil price regulations simply do not apply to the two-thirds of the Hawkins Field production owned by Exxon. By their terms, says Exxon, the regulations apply only to a "first sale" of domestic crude petroleum. 10 C.F.R. § 212.71. All Exxon-owned production was simply transferred from Exxon's production division to its refining division. No "sale" ever occurred, therefore the regulations do not apply. In any event, if the court does deem Exxon's intra-company transfers to be "sales", Exxon was the first purchaser of all Exxon-owned production, along with virtually all of the remaining production, and therefore Exxon as purchaser is the victim of the overcharges to whom reimbursement is due.

Exxon's arguments are without merit. The Subpart D regulations, it is true, have always applied only to a "first sale" of domestic crude petroleum. 10 C.F.R. § 212.71.

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[52]Exxon's argument that it cannot be held liable for overcharges on the 5 percent of Hawkins Field production owned and taken by Texaco was rejected in *Sauder v. DOE, supra,* 648 F.2d 1341. Sauder argued, like Exxon, that he could not be found responsible for the overcharges on the share of production received and sold by other interest owners. The TECA rejected Sauder's argument and held him, as operator and animating force of the unit, responsible for all overcharges from the leases, regardless of whether Sauder himself received all of the monies illegally obtained. 648 F.2d at 1347–49.

And "first sale" was formally defined by the agency only in February 1976, as follows:

> "First sale" means the first transfer for value by the producer or royalty owner. With respect to transfers between affiliated entities, the "first sale" shall be imputed to occur as if in arms-length transactions.

41 Fed.Reg. 4931, 4940 (1976); 10 C.F.R. § 212.72 (1977). Contrary to Exxon's arguments, however, the February 1976 definition of "first sale", which clearly brings intra-company transfers within the ambit of the regulation, was not a break from, but rather a confirmation of, past agency application of the term. Official agency Interpretations issued before the February 1976 definition referred to "intra-firm sales."[53] At the request of the FEA,[54] however, the Congress in the EPCA directed promulgation of the "first sale" definition to clarify the FEA's already existing authority. As the Conference Report explained:

> It is the intention of the conferees that the term "first sale" be defined in the regulations *to make clear* that it applies to the first transfer of a barrel of crude oil for value in an arms-length transaction. *With respect to transactions between affiliated or associated companies, FEA has the authority to impute a transfer value,* which bears a reasonable relationship to transfers between unaffiliated persons in arms-length transactions. *It is the conferees' understanding that the regulation defining "first sale" could extend principles and procedures now applicable under current regulations* to determine transfer prices for imports as well as the point of sale and sales price of old crude oil

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[53] *See, e.g.*, Interpretation 1975-3, 42 Fed.Reg. 23, 724; 23,726 (1977).

[54] *See* PX 304 at 11-12 (Letter from FEA Administrator Frank Zarb to Sen. Henry Jackson, December 6, 1975).

> and stripper well oil, *to all ceiling prices promulgated under the new pricing program.*

S.Rep. No. 516, 94th Cong., 1st Sess. at 190 (1975) (emphasis added), U.S.Code Cong. & Admin.News, p. 2032.

That the crude oil price regulations applied to intra-company transfers even before the clarifying amendment is supported by TECA decisions interpreting similar language in analogous rules. In *Johnson Oil Co. v. DOE,* 690 F.2d 191 (Em.App.1982), a crude oil reseller argued that it should be allowed to charge higher New Item prices, under the Subpart F reseller pricing rules, for crude oil sold during a certain period. In order to reap the benefits of the New Item Rule, the seller could not have sold that item in the preceding year. 10 C.F.R. § 212.111(a)(1). Johnson Oil argued that all its crude oil "transactions" in the year preceding the overcharge period were intra-firm transfers, not "sales", which it interpreted to mean only arms-length transactions between third parties. The TECA disagreed, holding that "the plain meaning of the rule does not differentiate between sales to affiliated parties . . . and transactions." 690 F.2d at 197. *Cf Gulf Oil Corp. v. DOE,* 671 F.2d 485 (Em.App.1982) ("first sale" of natural gas liquids and natural gas liquid products under Subpart K includes "transfers" by refiners and processors to their affiliated marketers). In the same manner, the plain meaning of "first sale" in 10 C.F.R. § 212.71 includes intra-company transfers of crude oil from production to refining divisions. To hold otherwise would lead to the ludicrous result of allowing integrated oil companies largely to escape crude oil price regulation, a result plainly not contemplated by Congress.

If the transfers of Hawkins Field crude oil from Exxon as producer to Exxon as refiner are "first sales", says

Exxon, then those sales, along with Exxon's purchases from the other interest owners of the bulk of the remaining Hawkins Field production, resulted in overcharges suffered by Exxon as refiner, and any refunds should be made to it. But Exxon's portrayal of itself as victim ignores the workings of the mandatory Entitlements Program which, together with price controls on refiners, resellers, and retailers, allowed Exxon to spread the cost of its Hawkins Field overcharges across the land. The purpose of the Entitlements Program was to permit all refiners to share the financial benefits of the limited available quantity of relatively inexpensive price-controlled crude oil. Under the Entitlements Program, the FEA each month allotted to each refiner a certain number of entitlements, equal to that refiner's deemed share of the old oil refined nationwide during that month. If a refiner was in fact able to obtain and refine a proportionately large amount of low-priced old oil, greater than its allotted entitlements, that refiner would have to buy entitlements from those less fortunate refiners which refined a proportionately small amount of low-priced oil. The price of an entitlement was roughly the difference between the price of controlled and uncontrolled oil. The effect of the entitlements transfers, therefore, was to equalize the average weighted crude oil costs of all refiners. *Union Oil Co. of California v. DOE*, 688 F.2d 797, 801-02 (Em. App.1982); *Pasco, Inc. v. FEA*, *supra*, 525 F.2d at 1395.

As a result of Exxon's misclassification, less old oil was reported to the Entitlements Program. DOE therefore issued fewer entitlements to each refiner, and each refiner had to purchase more, or sell fewer, entitlements than it would have if Exxon had properly classified the Hawkins Field oil. Exxon, by improperly classifying old oil as new oil at the Hawkins Field, thereby increased the average cost of crude oil of all refiners. At the same time, although

Exxon as refiner appeared initially to bear the burden of the overcharges of Exxon as producer, in fact Exxon was able to keep the ill-gotten gains by improving its entitlements position. It was able to buy fewer, or sell more, entitlements than it had a right to.

Exxon argues that it must be allowed to conduct further discovery to determine if the Entitlements Program in fact operated as it was designed and to trace the Hawkins Field overcharges to their ultimate victims. In effect, Exxon would like to launch a nationwide inquiry into the workings of more than 200 domestic refiners during a period of serveral years. Such an inquiry, whose purpose could only be to postpone Exxon's day of reckoning, is unnecessary. The cost-spreading effect of the Entitlements Program has long been recognized by the TECA. The purpose of the Entitlements Program was "to spread the benefits of access to old price-controlled oil and the burden of dependence on uncontrolled oil among all sectors of the petroleum industry, all regions of the country, and among all consumers of petroleum products." *Cities Service Co. v. FEA, supra,* 529 F.2d 1016, 1021. Just as the program spread the benefit of access to old oil, so too did the program spread the burden of Exxon's overcharges among all sectors of the petroleum industry, all regions, and all consumers. The TECA faced a closely analogous situation in *Union Oil Co. of California v. DOE, supra,* 688 F.2d 797, where misclassification of price-controlled old oil as exempt oil

> reduced the total amount of crude oil production subject to price controls each month and therefore increased the total cost of the available crude oil supply. As a result, the benefits of price-controlled crude oil which were distributed among all refiners by the Entitlements Program were reduced. *Thus, to the extent that crude oil producers sold otherwise*

> *price-controlled oil as uncontrolled crude oil . . . the higher cost of such uncontrolled crude oil was distributed among all domestic refiners through the operation of the Entitlements Program.*

Id. at 802 (emphasis added).

Interestingly, Exxon itself, though it now feigns surprise and demands discovery, has long had the same understanding of the workings of the Entitlements Program. At a meeting of the Hawkins Field interest owners shortly after DOE issued to Exxon the January 1978 Notice of Probable Violation, one owner asked who would ultimately benefit if the Hawkins Field owners were required to make refunds to the purchasers of improperly classified Hawkins Field crude oil. Exxon attorney Barbara Finney explained "that the refunds to the purchasers would in turn require the purchasers to buy more entitlements from other refiners and that the net effect would be a decrease in the overall cost to the refining industry for domestic crude oil." PX 247 at 8 (Minutes of meeting at Hawkins Field working interest owners, February 3, 1978). Just as refunds would be spread throughout the industry to reduce the overall average cost to refiners of domestic crude oil, so did Exxon's overcharges spread throughout the industry to increase the average cost to refiners of domestic crude oil.[55]

At the same time, price regulations applicable to refiners allowed them to pass along the inflated costs of Hawkins Field crude oil to purchasers of refined products. Under those rules the price a refiner could charge for a refined product was generally limited to the refiner's

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[55]To the extent Exxon suffered as one of the 200 domestic refiners whose costs were inflated by the Hawkins Field overcharges, Exxon is barred by the doctrine of "unclean hands" from receiving equitable restitution of any of the overcharges. *See Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717, 723 (Em.App. 1982).

May 15, 1973 price plus, among other costs, the increased cost of crude oil. 10 C.F.R. § 212.83(c)(2)(iii). Similar pass-through provisions for increased costs also applied to crude oil resellers, product resellers and retailers. *See* 10 C.F.R. Part 212, Subparts F and L. As a result of the pervasive system of price controls which then existed, therefore, Exxon's overcharges were not, as it simplistically asserts, borne by Exxon itself, but instead were borne by ultimate consumers of petroleum products throughout the entire country.[56]

The broad scattering of the ill effects of Exxon's wrongdoing renders impossible the tracing of the overcharges to their ultimate victims and the calculation of the precise damages suffered by each. Yet this court is still faced with the task of fashioning an equitable remedy. The DOE suggests that, because ultimately all consumers suffered as a result of the overcharges, it would be most appropriate for the court to order payment into the Treasury of the United States government, the representative of all citizens. Exxon argues that the statute allows only reimbursement of the first purchasers of the overpriced crude oil, and then only after the DOE identifies the victims of the overcharges and proves the specific damages suffered by each. In any event, Exxon continues, under *Citronelle-Mobile Gathering, Inc. v. Edwards,* 669 F.2d 717 (Em.App.1982), payment to the United States Treasury may not be considered restitution.

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[56]On November 23, 1982 and on January 20, 1983, certain refiners and independent retailers, respectively, filed motions to intervene in this action, arguing that they as victims of the Hawkins Field overcharges were entitled to any recovery DOE might obtain. The preceding discussion shows, however, that due to the workings of regulations applicable throughout the oil industry, from producer to retailer, the real victims are the unidentifiable millions of ultimate consumers of petroleum products. Accordingly, the motions to intervene are denied.

As noted above, Section 209 of the Economic Stabilization Act empowers the court to require restitution of funds obtained in violation of the oil price regulations. The scope of the court's power is much broader than Exxon allows. To begin with, the remedy of restitution is fundamentally different from the remedy of damages. In *Sauder v. DOE, supra,* 648 F.2d 1341, Sauder argued that the DOE, in seeking to impose upon him alone responsibility for all overcharges, had tried to read into the statute a damages remedy not within the common law concept of restitution. In rejecting Sauder's argument, the TECA distinguished restitution from damages, writing: " 'In equity, restitution is usually thought of as *a remedy by which defendant is made to disgorge illgotten gains or* to restore the status quo or to accomplish both objectives.' " *Id.* at 1348, quoting 5 Moore's Federal Practice ¶ 38.24[2], 38–195 (2d ed. 1981) (emphasis added). The agency, the court continued, "does not seek to recover Mobil's *damages,* which may or may not be the anount of the overcharges." 648 F.2d at 1348. The TECA stated the difference even more bluntly in *Citronelle-Mobile Gathering, Inc. v. Edwards, supra,* 669 F.2d 717:

> The central purpose of restitution is to determine the amount by which the wrongdoer has been unjustly enriched and then to make him disgorge that amount. *No proof is required that the plaintiff was damaged, much less the amount of any damage.*

Id. at 722 (emphasis added). Accordingly, the DOE need not attempt the impossible task of proving the identity and particular damages of each victim of the Hawkins Field overcharges in order for this court to order restitution.

As explained above, prior to decontrol in January 1981 DOE controlled the price of oil at every stage of production. In those circumstances, if a court ordered restitution

of overcharges to the first purchaser of crude oil, that reimbursement would eventually be passed along to the ultimate consumer of petroleum products. *See Grigsby v. DOE*, 4 Energy Mgt. (CCH) ¶ 26,378 at 28,841 (W.D.La.1982). Since decontrol, however, there has existed no ready method of ensuring that overcharges will be refunded to their ultimate victims, the consumer. To order a refund to the first purchaser would simply result in a windfall gain for that purchaser — ironically, in this case, Exxon itself — who would be under no obligation to pass the refund along.

Exxon maintains nevertheless that it is beyond the equitable powers of this court to order payment into the United States Treasury and bases its argument on *Citronelle-Mobile Gathering, Inc. v. Edwards, supra*, 669 F.2d 717. In that case two domestic crude oil resellers sold crude oil to PETCO, the wholly-owned foreign subsidiary of an American corporation, NEPCO. The oil was refined in the Bahamas by BARCO, a subsidiary of PETCO, and then shipped to NEPCO in the United States. NEPCO in turn sold the refined products to utilities and institutions on the east coast. The sellers claimed the first sales were export sales, exempt from price controls. The district court denied the sellers' claims and held them in violation of the price ceilings. The government asked that the overcharges be paid into an escrow account for subsequent distribution to NEPCO customers. Instead, the district court *sua sponte* ordered restitution to the United States Treasury. The TECA affirmed, except as to remedy, holding that "payment to the United States Treasury is not restitution in the true sense of the word, or in the objectives of the statutes involved." 669 F.2d at 722.

Careful reading of the TECA decision reveals, however, that the court's modification of the district court's remedy

was not a blanket prohibition on the ordering of restitution to the Treasury. The district court, TECA explained, shaped its remedy under the mistaken impression that the ultimate overcharge victims were undeterminable millions of individuals along the east coast. The TECA found, however, that "the sale of the over-priced oil was made to determinable utilities and other institutions along the Atlantic seaboard." 669 F.2d at 722. Having demonstrated injury to an identifiable class of persons, the government had a duty to try to ascertain those overcharged and to make restitution to them, with interest, from the restitution funds. *Id.* at 723. To accomplish that end, the TECA remanded to the district court with instructions to order the violators to make restitution to the Treasury, but under special order of the court directing the Treasury to hold the funds in an escrow account for subsequent distribution, at DOE's direction, to NEPCO customers. *Id.*

The TECA's refusal in *Citronelle* to allow unconditional payment into the Treasury was clearly based on the facts in that case which permitted identification of the victims of the overcharges.[57] The four shipments which were the subject of inquiry in *Citronelle* all occurred within the six months ending in late May 1974, before implementation of the Entitlements Program. *See Citronelle-Mobile Gathering, Inc. v. O'Leary,* 499 F.Supp. 871, 874–75 (S.D.Ala. 1980), *aff'd sub nom. Citronelle-Mobile Gathering, Inc. v. Edwards, supra,* 669 F.2d 717. Consequently NEPCO's customers alone bore the entire burden of the

[57]To the extent that the utilities which purchased overpriced oil from NEPCO were able under state public utility regulation to pass through increased operating costs to customers, presumably those same state regulatory bodies could act to ensure that the effects of the refunds received by those utilities from the escrow account would also eventually reach the ultimate consumer. Importantly, no corresponding mechanism exists in the case before the court.

overcharges. DOE could measure their losses accurately and direct appropriate payment to them from the escrow fund suggested by the TECA.

Exxon's Hawkins Field overcharges, on the other hand, were diffused throughout the country. Creation of an escrow fund would serve no purpose. Monies in such a fund would languish there indefinitely, because DOE could never accurately determine the losses suffered by any one claimant. Thus, the facts which required the court in *Citronelle* to order actual reimbursement of overcharges are not present here, and this court is not precluded on the facts before it from ordering Exxon to make restitution to the Treasury.

[14] A district court, sitting as a court of equity, unless applicable statutes provide otherwise, has " 'all the inherent equitable power of the District Court . . . available for the proper and complete exercise of that jurisdiction'; and has power 'to do equity and mould each decree to the necessities of the particular case.' " *Citronelle-Mobile Gathering, Inc. v. Edwards, supra,* 669 F.2d at 722, quoting *Porter v. Warner Holding Co.,* 328 U.S. 395, 398, 66 S.Ct. 1086, 1089, 90 L.Ed.2d 1332 (1946). The applicable statutes here do not limit this court's equitable powers. *Sauder v. DOE, supra,* 648 F.2d at 1348. The explicit reference to restitution in Section 209 of the ESA was to settle any doubt that " 'there was an inherent equitable power in the court to set things right and order restitution.' " *Id.,* quoting S.Rep. No. 507, 92d Cong., 1st Sess. 9 (1971), U.S. Code Cong. & Admin.News, pp. 2283, 2291. Section 209 neither limits the power of the court to restitution nor to a particularly strict interpretation of restitution. 648 F.2d at 1348.

Furthermore, to order restitution to the Treasury in these circumstances is consistent with the principle underlying enforcement of the regulations that "[a]ctions

taken by the United States under ESA § 209 are taken to enforce public, not private rights. Thus, compensation is 'a by-product of the agency's effort to reestablish compliance with its regulatory scheme.' " *Citronelle-Mobile Gathering, Inc. v. Edwards, supra,* 669 F.2d at 722.

Indeed, the TECA in *Citronelle* did not disapprove any and all payments of restitution to the Treasury; it disapproved only the unconditional payment ordered by the district court. But the TECA itself directed payment into the Treasury, into an escrow account subject to certain conditions. In accordance with that principle, this court shall order Exxon to make restitution of the full amount of the overcharges, plus interest, to the Treasury, for deposit into an escrow account.

The task of this court in delineating the terms and conditions of that account has been made easier by recent Congressional action. On December 21, 1982 Congress enacted Pub.L. No. 97-377, 96 Stat. 1830 (1982) providing continuing appropriations for fiscal year 1983. Section 155 of that law provides a formula for the disbursement of "designated petroleum violation escrow funds", defined as "amounts (not in excess of $200,000,000) which are derived from settlements from alleged petroleum pricing and allocation violations . . . ." The purpose of Section 155 is

> to provide the Secretary of Energy the exclusive authority for the disbursement of the designated petroleum violation escrow funds for limited restitutional purposes (1) which are reasonably expected to benefit the class of persons injured by such violations, and (2) which . . . are likely not to be . . . otherwise refunded to injured persons because the purchasers of the refined petroleum products cannot be reasonably identified or paid or because the

> amount of each purchaser's overcharge is too small to be capable of reasonable determination.
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> Pub.L. No. 97-377, § 155(a), 96 Stat. 1830, 1919 (1982).

Under the terms of the new law, the Secretary of Energy must distribute the escrow fund to the governors of each of the states, with the amount due each state based on that state's share of nationwide consumption of refined petroleum products from 1973 to 1981. *Id.*, § 155(c), (d). Each state must then use the funds under one or more of five existing federal energy conservation programs identified in the new law, including weatherization of buildings; implementing state energy conservation programs; cutting energy consumption in, or finding cheaper alternate energy sources for, schools and hospitals; promoting conservation by small businesses and individuals; and helping poor people pay home utility bills.[58] None of the funds may be used to defray administrative expenses of the DOE or any state. *Id.*, § 155(f).

The court shall order Exxon to make restitution to the United States Treasury of the full amount of the Hawkins Field overcharges, together with interest from the date of overcharge, the monies to be deposited into an escrow account, held in trust by the Department of Energy, to be disbursed in accordance with the procedures set forth in Section 155 of Pub.L. No. 97-377, 96 Stat. 1830, 1919 (1982).

In formulating its order, the court in no way relies on Section 155 as an express statutory grant of authority to

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[58]The "energy conservation programs" identified in Section 155(e)(2) are: (1) the program under Part A of the Energy Conservation in Existing Buildings Act of 1976, 42 U.S.C. § 6861 *et seq.*; (2) the programs under part D of title III of the Energy Policy and Conservation Act, 42 U.S.C. § 6321 *et seq.*; (3) the program under part G of title III of the Energy Policy and Conservation Act, 42 U.S.C. § 6371 *et seq.*; (4) the program under the National Energy Extension Service Act, 42 U.S.C. § 7001 *et seq.*; and (5) the program under the Low-Income Home Energy Assistance Act of 1981, 42 U.S.C. § 8621 *et seq.*

this court, but acts instead in the exercise of its broad equitable powers to order restitution.[59] However, Section 155 clearly bespeaks the intent of Congress that violators of the petroleum price regulations should be made to disgorge their illgotten gains even in situations, like the case before the court, where the victims of the petroleum overcharges cannot be identified. The colossal scale of Exxon's wrongdoing, and the workings of pervasive regulations to spread the burden of that wrongdoing impossibly far and wide, must not deter this court from fashioning an appropriate equitable remedy. The purpose of the domestic petroleum price regulations was to keep oil prices down, to relieve consumers of some of the burden of towering oil costs. The five energy conservation programs identified in Section 155 operate across the nation to reduce that same burden, either by reducing overall consumption through conservation or by direct financial assistance to those most in need. Although one might speculate as to alternative remedies, this court respects the wisdom of the solution chosen by Congress and shall adopt it as the most appropriate equitable remedy in the circumstances of this case.

B. *Amount of overcharges*

The court has held that Exxon should have established a unit BPCL on January 1, 1975, the date a significant alteration in producing patterns occurred at the Hawkins

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[59]Accordingly, the escrow fund established pursuant to this court's order shall of course not be subject to the provisions of subsection (e)(1) of Section 155 which limit the monies the Secretary of Energy may disburse to $200 million—received in settlements, not pursuant to judicial order—and which require a finding that the funds to be disbursed "are not likely to be required for satisfying claims of potential claimants . . ." and that "the use [of funds] under this section would be consistent with the remedial order or consent order covering such funds." Section 155 shall otherwise apply in its entirety under this court's order as the set of terms and conditions governing DOE's handling of the escrow account established to receive restitution payments from Exxon.

Field Unit, and that Exxon may not claim the incentives of Section 212.75, but instead must proceed under Section 212.72. That done, calculation of Exxon's overcharges becomes a straightforward matter of comparing Exxon's actual accounting practices with those it should have applied. Using production, sales and price data derived from Exxon documents obtained through audits or discovery,[60] DOE has calculated the amount of overcharges for each month from January 1975 through January 1981. For each month DOE has determined the appropriate unit BPCL and total unit production, as well as cumulative deficiency, if any. In so doing DOE has accorded Exxon the benefit of every favorable modification of the applicable regulations, even if not claimed by Exxon.[61] Simple addition and subtraction yield the number of barrels, if any, Exxon was allowed to claim as upper-tier or exempt. Comparison with the number of barrels actually claimed by Exxon as upper-tier or exempt yields the number of barrels in violation. That number, when multiplied by the difference between the price received by Exxon and the lower-tier price, yields the amount of overcharges for that month. Finally, DOE has totalled the cumulative overcharges each month. The summary data which were the basis of DOE's calculations are reproduced in Appendix I to this opinion.

Although Exxon contends that DOE's overcharge calculations are "grossly inflated", Def.Opp. at 289, Exxon has not challenged the mathematical accuracy of DOE's calculations, nor the accuracy of the underlying data.

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[60]The unit BPCL and cumulative deficiency for January 1975 came from information given to Texaco, a Hawkins Field interest owner, in early July 1975. PX 117 (Letter from H.M. Krause, Jr. to Texaco, Inc., April 2, 1975). Data on the amounts of lower and upper-tier or exempt oil claimed by Exxon was derived from statements given by Exxon to Mobil, another Hawkins Field interest owner. PX 284.

[61]*See* Pltf.Mem. at 135–39.

Instead Exxon limits its attack to a reiteration of its previous arguments that it acted properly in establishing a unit BPCL on September 1, 1976 under Section 212.75. The court has rejected Exxon's arguments.

Accordingly, there being no dispute of fact as to the validity or accuracy of DOE's calculations, the court finds the total amount of overcharges by Exxon at the Hawkins Field Unit from January 1975 through January 1981 to be $895,501,163.85.

C. *Interest*

The court's equitable powers to order restitution permit the court to deprive the wrongdoer of all enrichment obtained at the victim's expense, *Citronelle-Mobile Gathering, Inc. v. Edwards, supra,* 669 F.2d at 722, and that enrichment necessarily includes the benefits Exxon obtained by having the use over the years of the money illegally obtained. Accordingly, this court shall order that restitution of Exxon's overcharges shall be made with interest from the date of overcharge. *Cf. Bonray Oil Co. v. DOE,* 472 F.Supp. 899, 904 (W.D.Okl.1978), *aff'd per curiam* 601 F.2d 1191 (Em.App.1979) ("[T]he requirement that sellers who violate regulations and orders promulgated under the EPAA also pay interest on the amount of the overcharge is a rational method to 'make whole' those who have been overcharged.").

DOE proposes several alternative rates of interest, ranging from Exxon's annual average rate of return, after tax, for capital deployed in domestic production activities from 1975 through 1981, 23.7 percent; the prime rate; or, finally, the schedule of interest rates it has applied in administrative enforcement actions since February 1980.

The court adopts the last formula. It is identical to the schedule long used by the Federal Energy Regulatory Commission in its enforcement actions, *see* 46 Fed.Reg.

21,412 (1981). It is the schedule which DOE would have applied to Exxon's overcharges had they been assessed in a DOE Remedial Order following administrative adjudication. Most important, because the rate has since October 1979 been based on an average of prime rate values as determined by the Federal Reserve, the schedule bears a reasonable relation to the value to Exxon of the funds it unlawfully retained. The formula for calculating the applicable rate, as well as a summary of the rates determined according to that formula through July 1982, are attached hereto as Appendix II.

D. *Civil Penalties*

Finally, the government asks the court to assess civil penalties against Exxon. Section 208(b) of the ESA, 12 U.S.C. § 1904 note, incorporated in Section 5(a)(1) of the EPAA, 15 U.S.C. § 754, authorizes the court to assess civil penalties of not more than $2500 for each violation of the pricing regulations occurring prior to December 16, 1975. The EPCA increased the penalties to $20,000 for each violation after December 16, 1975. Agency regulations provide that "[e]ach day that a violation . . . continues shall be deemed to constitute a separate violation within the meaning of the provisions of this chapter relating to . . . civil penalties." 10 C.F.R. § 205.203(a)(2). Counting each day that overcharges occurred at the Hawkins Field as a separate violation from January 1, 1975 through January 27, 1981, DOE has calculated the maximum civil penalty to be $38.27 million.

Upon careful consideration of the voluminous record in this case,[62] the court declines to assess civil penalties against Exxon. As the DOE has itself admitted, the oil

[62]In connection with their cross-motions for summary judgment, the parties filed more than 1,000 pages of memoranda, supported by fourteen volumes of appendices containing approximately 600 exhibits.

price regulations are complex, and the unit property rule which is the cornerstone of DOE's case was only implicit in the original property definition of Section 212.72. *See Pennzoil Co. v. DOE, supra,* 680 F.2d at 176.

This is not to excuse Exxon's behavior. Exxon pushed the agency at every turn and probed each nuance in the regulations to interpret them to Exxon's advantage, sometimes ignoring their unequivocal dictates. Still, DOE has not proven, because it need not, that Exxon in fact gerrymandered production at the Hawkins Field in an attempt knowingly to circumvent price controls. The course of conduct which brought Exxon within the ambit of the unit property rule of Section 212.72—unitization and gas injection—was undertaken for bona fide business reasons and indeed was traced long before any regulations on crude oil prices existed.

Nor did Exxon attempt to dissimulate its accounting practices at the Hawkins Field. On the contrary, it made repeated inquiries and comments, accurately representing its conduct to the agency, in the hope of changing agency policy. The informal replies Exxon received, though no basis for estoppel of the government, were nevertheless at times puzzling.

The court finds that the circumstances of this case do not warrant assessment of civil penalties.[63]

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[63]Other courts which have found regulatory violations and ordered restitution of overcharges have nevertheless refused to assess civil penalties and often for reasons similar to those given above. *See, e.g., Sauder v. DOE,* 4 Energy Mgt. (CCH) ¶ 26,157 (D.Kan.1980), *aff'd,* 648 F.2d 1341 (Em.App.1981) (award of penalties inappropriate because regulatory definition of "property" confusing and agency made no finding of gerrymandering); *Citronelle-Mobile Gathering, Inc. v. O'Leary,* 499 F.Supp. 871 (S.D.Ala.1980), *aff'd sub nom. Citronelle-Mobile Gathering, Inc. v. Edwards, supra,* 669 F.2d 717 (penalties inappropriate because, *inter alia,* violators clearly explained their behavior to Commerce Department).

Plaintiff shall submit a proposed judgment for the court's consideration no later than 15 days from the date hereof, and defendant shall file its reply thereto no later than 10 days thereafter.

Appendix I

OPERATOR: Exxon Company, USA
PROPERTY NAME: Hawkins Field Unit
COUNTY AND STATE: Wood County, Texas

DATE	BPCL	BARRELS SOLD	CUM DEF	(ALLOWABLE SALES BBLS) NEW	RELEASED	TOTAL
			2310657.00			
1/75	2262898.00	3460686.80	1112868.20	0.00	0.00	0.00
2/75	2422029.00	3088253.30	446643.90	0.00	0.00	0.00
3/75	2873208.00	3476100.26	0.00	156248.36	156248.36	312496.72
4/75	3132625.00	3325164.41	0.00	192539.41	192539.41	385078.82
5/75	3374995.00	3437900.22	0.00	62905.22	62905.22	125810.44
6/75	3210502.00	3327490.34	0.00	116988.34	116988.34	233976.68
7/75	3306766.00	3406759.40	0.00	99993.40	99993.40	199986.80
8/75	3310681.00	3426979.44	0.00	116298.44	116298.44	232596.88
9/75	3148044.00	3328544.70	0.00	180500.70	180500.50	361001.40
10/75	3400107.00	3420890.39	0.00	20783.39	20783.39	41566.78
11/75	3211371.00	3282074.89	0.00	70703.89	70703.89	141407.78
12/75	3294406.00	3426138.29	0.00	131732.29	131732.29	263464.58
1/76	2262898.00	3411987.05	0.00	1149089.05	1149089.05	2298178.10
2/76	2927544.61	3268644.39	0.00	341099.78	0.00	341099.78
3/76	3156445.24	3392140.02	0.00	235694.78	0.00	235694.78
4/76	3054624.43	3350070.55	0.00	295446.12	0.00	295446.12
5/76	3156445.24	3456725.59	0.00	300280.35	0.00	300280.35
6/76	3059477.23	3311341.49	0.00	251864.26	0.00	251864.26
7/76	3161459.80	3404466.24	0.00	243006.44	0.00	243006.44
8/76	3161459.80	3411372.07	0.00	249912.27	0.00	249912.27
9/76	3059477.23	3200400.82	0.00	140923.59	0.00	140923.59
10/76	3161459.80	3267286.41	0.00	105826.61	0.00	105826.61
11/76	3059477.23	3168078.89	0.00	108601.66	0.00	108601.66
12/76	3161459.80	3151089.10	10370.70	0.00	0.00	0.00
1/77	3161459.80	2825880.59	345949.91	0.00	0.00	0.00
2/77	2957494.56	2647308.40	656136.07	0.00	0.00	0.00
3/77	3161459.80	2922117.52	895478.35	0.00	0.00	0.00
4/77	3059477.23	2777140.72	1177814.86	0.00	0.00	0.00
5/77	3161459.80	2920300.05	1418974.61	0.00	0.00	0.00
6/77	3059477.23	2747579.21	1730872.62	0.00	0.00	0.00
7/77	3161459.80	2733688.10	2158644.32	0.00	0.00	0.00
8/77	3161459.80	2658730.03	2661374.10	0.00	0.00	0.00
9/77	3059477.23	2530527.16	3190324.16	0.00	0.00	0.00
10/77	3161459.80	2625265.24	3726518.71	0.00	0.00	0.00
11/77	3059477.23	2505620.29	4280375.74	0.00	0.00	0.00
12/77	3161459.80	2553364.93	4888470.61	0.00	0.00	0.00
1/78	3161459.80	2471858.78	5578071.63	0.00	0.00	0.00
2/78	2957494.56	2209923.76	6325642.43	0.00	0.00	0.00
3/78	3161459.80	2409479.91	7077622.32	0.00	0.00	0.00
4/78	3059477.23	2241673.15	7895426.40	0.00	0.00	0.00
5/78	3161459.80	2279936.58	8776949.62	0.00	0.00	0.00
6/78	3059477.23	2313557.83	9522869.01	0.00	0.00	0.00
7/78	3161459.80	2344094.63	10340234.18	0.00	0.00	0.00
8/78	3161459.80	2441264.50	11260429.48	0.00	0.00	0.00
9/78	3059477.23	2083630.89	12236275.82	0.00	0.00	0.00
10/78	3161459.80	2232892.02	13164843.60	0.00	0.00	0.00
11/78	3059477.23	2100939.43	14123381.40	0.00	0.00	0.00
12/78	3161459.80	2102996.02	15181845.18	0.00	0.00	0.00
1/79	3161459.80	2056508.20	16286796.78	0.00	0.00	0.00
2/79	2957494.56	1935355.61	17308935.73	0.00	0.00	0.00
3/79	3161459.80	2032336.67	18438058.86	0.00	0.00	0.00
4/79	3059477.23	1961051.46	19536484.62	0.00	0.00	0.00
5/79	3161459.80	1965368.10	20732576.32	0.00	0.00	0.00

Appendix I — Continued

PURCHASER: Exxon Company, USA
FIELD: Hawkins

ACTUAL SALES	(SALES IN APPARENT VIOLATION) # BBLS	BONUS	OVERCHARGES	CUM OVERCHARGES
2297789.00	2297789.00	6.0000	13786734.00	13786734.00
1997999.00	1997999.00	6.4000	12787193.60	26573927.60
2180673.00	1868176.28	6.4000	19956328.19	38530255.79
1799331.00	1414252.18	6.7000	9475489.61	48005745.40
1836020.00	1710209.56	6.7000	11458404.05	59464149.45
1685954.00	1451977.32	6.7011	9729845.22	691193994.67
1722834.00	1522847.20	7.0026	10663889.80	79657864.47
1717721.00	1485124.12	7.1900	10678042.42	90535926.89
1716269.00	1355267.60	7.2900	9679900.80	100415827.89
1498974.00	1457407.22	7.5400	10988850.44	111404678.13
1455581.00	1314173.22	7.7900	10237409.38	121642087.51
1609927.00	1346462.42	7.7900	10488942.25	132131029.76
2417713.00	119534.90	7.7900	931176.87	133062206.63
1934181.43	1593081.65	5.9700	9510697.45	142572904.08
2027418.00	1791723.22	6.0100	10768256.55	153341160.63
1995410.00	1699983.88	6.0500	10284781.45	163625942.08
2068392.00	1768111.65	6.0800	10750118.83	174376060.91
2008093.00	1756228.74	6.1100	10730557.58	185106618.49
2039907.00	1790900.56	6.1100	10979082.42	196085680.91
2053008.00	1783095.73	6.1100	10894714.91	206980395.82
1903505.51	1762581.92	6.1144	10777130.87	217757526.69
1903657.26	1797830.65	6.1146	10993015.30	228750541.90
1903581.24	1794979.58	6.1145	10975402.62	239725944.61
1903581.25	1903581.25	6.1145	11639447.55	251365392.16
1903581.26	1903581.26	5.9151	11259873.51	262625265.67
1903581.24	1903581.24	5.9151	11259873.39	273885139.06
1903581.24	1903581.24	5.4664	10405736.49	284290875.55
1903581.25	1903581.25	5.4664	10405736.55	294696612.10
1903581.24	1903581.24	5.4664	10405736.49	305102348.59
1903581.26	1903581.26	5.4664	10405736.60	315508085.19
1903581.25	1903581.25	5.4664	10405736.55	325913821.74
1857249.00	1857249.00	5.4454	10113463.70	336027285.44
1902656.51	1902656.51	5.6977	10840766.00	346868051.44
1902656.49	1902656.49	5.9269	11276854.75	358144906.19
1902656.49	1902656.49	6.1562	11713133.88	369858040.07
1902470.49	1902470.49	6.1860	11768682.45	381626722.52
1902656.50	1902656.50	6.2159	11826722.54	393453445.06
1902656.50	1902656.50	6.2457	11883421.70	405336866.76
1902656.51	1902656.51	6.2755	11940120.93	417276897.69
1902656.50	1902656.50	6.3054	11997010.30	429273997.99
1902656.51	1902656.51	6.3352	12053709.52	441327707.51
1902656.01	1902656.01	6.3750	12129432.06	453457139.57
1902656.51	1902656.51	6.4148	12205160.98	465662300.55
1902656.50	1902656.50	6.4546	12280886.64	477943187.19
1876593.01	1876593.01	6.5043	12205923.91	490149111.10
1939145.00	1939145.00	6.5639	12728353.87	502877464.97
1876593.00	1876593.00	6.6236	12429801.39	515307266.36
1939145.00	1939145.00	6.6634	12921298.79	528228565.15
1939145.00	1939145.00	6.7059	13003712.46	541232277.61
1751485.99	1751485.99	6.7457	11814999.04	553047276.65
1939145.00	1939145.00	6.7854	13157874.48	568205151.13
1876593.00	1876593.00	6.8311	12819194.44	579024345.57
1939145.00	1939145.00	6.8724	13326580.10	592350925.67

Appendix I — Continued

OPERATOR: Exxon Company, USA
PROPERTY NAME: Hawkins Field Unit
COUNTY AND STATE: Wood County, Texas

DATE	BPCL (Bbls)	TOTAL SALES (Bbls)	CUMULATIVE DEFICIENCY (Bbls)	ALLOWABLE SALES UPPER TIER/ EXEMPT (Bbls)	ACTUAL SALES UPPER TIER/ EXEMPT (Bbls)
6/79	1869154.20	1862155.27	0.00	0.00	1862155.27
				0.00	0.00
7/79	1899622.09	1823531.79	0.00	0.00	1823531.59
				0.00	0.00
8/79	1867784.85	1909925.56	0.00	42140.71	1909925.00
				0.00	0.00
9/79	1776723.49	1872859.91	0.00	96136.42	1872859.91
				0.00	0.00
10/79	1804110.36	1893769.72	0.00	89659.36	1893769.72
				0.00	0.00
11/79	1715103.03	1762225.53	0.00	47122.50	1762140.00
				0.00	0.00
12/79	1740435.88	1953014.64	0.00	212578.76	1939145.00
				0.00	0.00
1/80	1676761.40	1936779.21	0.00	248056.99	1842173.89
				11960.82	94605.32
2/80	1456981.73	1720295.62	0.00	239079.93	1557111.00
				24223.96	163175.00
3/80	1549412.43	1833881.61	0.00	245212.43	1575824.61
				39256.75	256057.00
4/80	1437810.92	1747684.06	0.00	252856.48	1421546.00
				57016.66	326138.00
5/80	1422063.46	1748171.65	0.00	251103.31	1341643.00
				75004.88	406529.00
6/80	1314569.98	1673328.45	0.00	259741.13	1207353.00
				99017.34	465854.00
7/80	1294714.50	1612948.08	0.00	215762.37	1089171.88
				102471.21	523047.91
8/80	1231040.01	1571949.90	0.00	215455.05	989276.34
				125454.84	581618.29
9/80	7129708.58	1431329.42	0.00	176749.81	834074.76
				124871.03	594855.89
10/80	1103691.05	1491141.30	0.00	209223.14	802267.00
				178227.12	689191.00
11/80	1006467.64	1501186.31	0.00	244391.02	738666.00
				250327.65	762202.98
12/80	976342.08	1415902.14	0.00	196922.91	631735.00
				242637.15	784167.00
1/81	9127667.60	1412823.77	0.00	201062.76	492647.00
				299093.39	478234.55

TOTAL OVERCHARGE (this exhibit)

CUMULATIVE OVERCHARGE

Appendix I — Continued

PURCHASER: Exxon Company, USA
FIELD: Hawkins

SALES IN VIOLATION			
QUANTITY (Bbls)	BONUS ($ Bbl)	OVERCHARGE ($)	CUMULATIVE OVERCHARGE ($)
1862155.27	6.9378	12919260.83	
0.00	0.0000	0.00	12919260.83
1823531.59	6.9935	12752868.17	
0.00	0.0000	0.00	25672129.00
1867784.29	7.0493	13166571.80	
0.00	0.0000	0.00	38838700.80
1776723.49	7.1160	12643164.35	
0.00	0.0000	0.00	51481865.15
1804110.36	7.1767	12947558.82	
0.00	0.0000	0.00	64429423.97
1715017.50	7.2447	12424787.28	
0.00	0.0000	0.00	76854211.25
1726566.24	7.3115	12623789.06	
0.00	0.0000	0.00	89478000.31
1594116.90	7.2994	11636096.90	
82644.50	29.1788	2411467.34	103525564.55
1318031.07	7.3400	9674348.05	
138951.04	29.2600	4065707.43	117265620.03
1330612.18	7.4000	9846530.13	
218800.25	29.2200	6393343.31	133505493.47
1168689.52	7.4000	8718423.82	
269121.34	29.1800	7852960.70	150076877.99
1090539.69	7.5100	8189953.07	
331524.12	29.1300	9657297.62	167924128.68
947811.87	7.5700	7173421.86	
366836.00	29.0800	10667610.07	185765160.61
873409.51	7.6300	6664114.56	
420576.70	29.0300	12209341.60	204638616.77
773821.29	7.6902	5950840.48	
456368.45	27.9810	12769505.69	223353962.94
657324.95	7.7501	5094334.09	
469984.66	27.1574	12763566.84	241216863.67
593043.87	7.8100	4631672.62	
510963.86	26.8600	13724489.82	259573026.31
494274.98	7.8800	3894886.84	
511875.33	26.8000	13718256.84	277186171.99
434812.09	7.9500	3456756.12	
541529.85	27.7500	15027453.34	295670381.45
291584.22	8.0200	2338505.44	
179141.16	28.7000	5141351.29	303150238.18
			303150238.18
			895501163.85

Appendix II

The DOE schedule for the computation of interest on overcharges, reprinted in 46 Fed.Reg. 21,412; 21,414 (1981) provides that interest should be computed:

> (1) At a rate of seven percent simple interest per annum prior to October 10, 1974;
>
> (2) At a rate of nine percent simple interest per annum between October 10, 1974 and September 30, 1979; and
>
> (3)a. At an average prime rate for each calendar quarter on or after October 1, 1979. The applicable average prime rate for each calendar quarter shall be the arithmetic mean, to the nearest one-hundredth of one percent, of the prime rate value published in the Federal Reserve Bulletin for the fourth, third, and second months preceding the first month of the calendar quarter.
>
> b. The interest paid under clause (3)a. should be compounded quarterly.
>
> c. . . .
>
> As applicable, interest should be computed from the date of the violation to the effective restitution date although where it is practically impossible to determine the specific date upon which a violation commenced, it may be necessary, for the purpose of computing interest, to treat all violations in a given month as having occurred on the last day of that month.

Under the above formula, the rates applicable to Exxon's Hawkins Field overcharges are:

Period	Rate (Percent)
January 1, 1975 to September 30, 1979	9.00 percent
October through December 1979	11.70
January through March 1980	14.28
April through June 1980	15.39
July through September 1980	18.22
October through December 1980	11.74
January through March 1981	14.03
April through June 1981	19.98
July through September 1981	18.27
October through December 1981	20.31
January through March 1982	18.46
April through June 1983	16.02
July 1982 through date of effective restitution, adjusted quarterly in accordance with the above formula	

APPENDIX D-1

Civil Action No. 78-1035

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
Plaintiff,
v.
EXXON CORPORATION,
Defendant.

Filed Feb. 5, 1981

ORDER

This matter is before the court *sua sponte.* It appears that the prosecution of defendant Exxon Corporation's Petition and Counterclaim for Interpleader and Declaratory Relief, which interpleads over 2000 parties, may result in substantial administrative burdens being imposed on the parties and the court. It further appears that the government's theory of operator liability, which underlies Exxon's Petition and Counterclaim, may be found to be inappropriate in a case currently pending before the Temporary Emergency Court of Appeals, *Sauder v. DOE,* appeal docketed, No. 10-25 (May 22, 1980). It further appears that, regardless of the decision in *Sauder v. DOE,* Exxon's motion to dismiss may then be ripe for disposition by this court. Thus, it is not yet clear that Exxon's interpleader action need now proceed, inasmuch as it is possible (although the court expresses no opinion as to the relative likelihood) both that the impetus behind Exxon's petition and counterclaim may be removed, and that this case may be dismissed. Therefore, rather than addressing at this time the administrative problems resulting from Exxon's petition and counterclaim, the court finds it advisable to extend the time within which the interpled parties must respond to Exxon's petition and counterclaim. In this way, the court will defer considera-

tion and resolution of the administrative problems until a later time. Therefore, in accordance with the foregoing, it is, by the court, this 5th day of February, 1981,

ORDERED that all defendants in Exxon Corporation's Petition and Counterclaim for Interpleader and Declaratory Relief shall answer or otherwise respond within 20 days from the date of service of notice by this court that such answers or other responses shall be filed.

/s/ Thomas A. Flannery
United States District Judge

APPENDIX D-2

Civil Action No. 78-1035

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
Plaintiff,
v.
EXXON CORPORATION,
Defendant.

Filed Dec. 15, 1982

ORDER

Upon consideration of Defendant's Motion to Stay Consideration of the "Conditional Motion of Indicated Refiners to Intervene," the submissions of the plaintiff and the potential intervenors in connection therewith, and the entire record in this case, it is, by the Court, this 5th day of December, 1982,

ORDERED that Defendant's Motion to Stay Consideration of the "Conditional Motion of Indicated Refiners to Intervene" is granted; and it is further

ORDERED that the Indicated Refiners' Conditional Motion to Intervene is stayed until further order of this Court, and no responses to that Motion shall be made by the parties until 1 days after service of notice by this Court that such responses shall be filed; and it is further

ORDERED that there shall be no filing of briefs *amicus curiae* or responses thereto by the potential intervenors or the parties, respectively, concerning remedial issues until further order of this Court.

/s/ Thomas A. Flannery
United States District Judge

APPENDIX D-3

Civil Action No. 78-1035
IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
Plaintiff,
v.
EXXON CORPORATION,
Defendant.
Filed Feb. 3, 1983

ORDER

Upon consideration of Defendant's Motion to Stay Consideration of the "Petition for Limited Intervention" and the entire record in this case, it is, by the Court, this 3rd day of February, 1983,

ORDERED that Defendant's Motion to Stay Consideration of the "Petition for Limited Intervention" is granted; and it is further

ORDERED that the Petition for Limited Intervention is stayed until further order of this Court, and no response to the Petition shall be made by the parties until 10 days after service of notice by this Court that such responses shall be filed; and it is further

ORDERED that there shall be no filing of briefs *amicus curiae* or responses thereto by the potential interventors or the parties, respectively, concerning remedial issues until further order of this Court.

/s/ Thomas A. Flannery
United States District Judge

APPENDIX D-4

Civil Action No. 78-1035
BEFORE THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
Plaintiff,
v.
EXXON CORPORATION,
Defendant.

Filed April 11, 1983

ORDER

This 11th day of April, 1983, it is hereby ORDERED that the unopposed Motion of Indicated Refiners for Reconsideration of Denial of Intervention filed on April 6, 1983 is granted, that the Conditional Motion of the Indicated Refiners filed on November 24, 1982 is granted, and that Champlin Petroleum Company, Tenneco Oil Company, Pennzoil Company, Tosco Corporation, Ashland Oil, Inc., Texas City Refining, Inc., and the American Petroleum Refiners Association may intervene in this action solely for purposes of appeal on the remedy issue.

/s/ Thomas A. Flannery
THOMAS A. FLANNERY
United States District Judge

APPENDIX D-5

Civil Action No. 78-1035
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
Plaintiff,
v.
EXXON CORPORATION,
Defendant.
Filed April 29, 1983

MEMORANDUM

On March 25, 1983 this court issued a Memorandum Opinion ("Mem.") disposing of the parties' cross-motions for summary judgment and directing plaintiff Department of Energy ("DOE") to submit a proposed judgment for the court's consideration within fifteen days, with defendant Exxon Corporation ("Exxon") to submit its comments thereon no later than ten days thereafter. DOE submitted its proposed judgment on April 11, 1983. Exxon filed its reply on April 21, 1983.

After the issuance of the Memorandum Opinion several motions to intervene were filed. The motions can be divided into two groups, those by oil refiners, wholesalers and retailers, on the one hand, and those by several States on the other.[1] Both groups focus their attention on

[1]Each of the motions to intervene is listed in the Order which accompanies this Memorandum. In addition, a group of refiners consisting of Champlin Petroleum Company, Tenneco Oil Company, Pennzoil Company, Tosco Corporation, Ashland Oil, Inc., Texas City Refining, Inc., and the American Petroleum Refiners Association (the "Indicated Refiners"), filed a motion for reconsideration of the denial of their earlier motion to intervene. The motion for reconsideration was granted on April 11, 1983.

The "Retailers" appearing in the Order accompanying this Memorandum filed a petition for limited intervention on January 20, 1983, which was denied in the Memorandum Opinion. Mem. at 77 n.56. Unlike the Indicated

the remedy fashioned by the court which directs payment by Exxon of the overcharges into an escrow account at the United States Treasury, to be disbursed to the States in accordance with the procedures of Section 155 of Pub. L. No. 97-377. Mem. at 83-85. The industry applicants contest that remedy, arguing that they were the victims of the overcharges to whom restitution is due. They now seek to intervene solely for the purpose of establishing their right to appeal the remedy question to the Temporary Emergency Court of Appeals ("TECA"). The States, too, seek to intervene solely on the remedy issue, but wish to have the opportunity to comment on the proposed judgment as well.

Both the industry applicants and the States contend that they may intervene as a matter of right under Fed. Rule Civ. Pro. 24(a)(2), claiming an interest in the subject matter of this action, namely, in the distribution of the fund created by restitution of the overcharges by Exxon. In the alternative, the applicants seek permissive intervention under Fed. Rule Civ. Pro. 24(b)(2).

Both DOE and Exxon have opposed the various motions of the States to intervene. DOE argues that the motions are untimely and will result in undue delay and confusion. Exxon argues that the States have no legally

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Refiners, the Retailers have filed no motion for reconsideration. The court, however, will *sua sponte* reconsider its denial of the Retailers' petition for intervention in light of the standards discussed at pp. 3-5, *infra*. The court will, however, afford DOE and Exxon an opportunity to respond to the petition for intervention, to address in particular the question of whether the Retailers ought to be allowed to intervene not only on behalf of themselves but also as representatives of a class of similarly situated retailers.

Finally, the States of Arkansas, Delaware, Iowa, Kansas, Louisiana, North Dakota, Rhode Island and Texas have moved to intervene and have also moved that the court certify a class consisting of all States not otherwise represented by counsel before this court. The court finds, however, that the proposed class is not so numerous as to make joinder impracticable, in view of the narrowness of the issue on which the States are being allowed to intervene, and so will deny the motion for class certification.

protected "interest" in this action and that, in any event, the States' interest, if any, is adequately represented by DOE. In addition, DOE and Exxon have opposed the motion of one of the industry applicants, arguing that it is untimely and that the interests of this applicant are adequately represented by the one group of Indicated Refiners whose motion to intervene has been granted.

The court finds that the applicants for intervention are entitled to intervene as a matter of right under Fed. Rule Civ. Pro. 24(a)(2).

Rule 24(a)(2) sets forth four prerequisites to intervention of right: (1) an interest in the subject matter of the action; (2) possible impairment as a practical matter of the ability to defend that interest if intervention is denied; (3) inadequate representation of that interest by existing parties; (4) a timely application for intervention.

The "interest" to be protected is not so narrowly defined as Exxon would have it. The present language of Rule 24 was designed to liberalize the right to intervene in federal actions, *United States v. AT&T*, 642 F.2d 1285, 1291 (D.C. Cir. 1980), and is to be "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Smuck v. Hobson*, 408 F.2d 175, 179 (D.C. Cir. 1969), quoting *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967).

In this case, the industry applicants — refiners, wholesalers, and retailers — all allege that they, not the ultimate consumers of petroleum products, bore the burden of Exxon's overcharges and are entitled to restitution. For purposes of deciding whether to allow intervention the court must accept a party's well-pleaded allegations as true, and cannot look behind those allegations to reach the merits of the applicant's claims as a basis for denying

intervention. *United States v. AT&T, supra*, 642 F.2d at 1291. The industry applicants have properly pleaded an interest in the overcharges by Exxon, and so have satisfied the "interest" test. The States, for their part, obviously have a strong interest in defending before this court and on appeal this court's decision that they, on behalf of their citizens, are to receive restitution of the overcharges.

Furthermore, the States have adequately demonstrated that representation of their interest by DOE may be inadequate. The applicant need only show that representation of his interest "may be" inadequate, and the burden of making that showing is "minimal." *Trbovich v. United Miner Workers of America*, 404 U.S. 528, 538 n.10 (1972). DOE never pursued or even suggested the remedy fashioned by this court. The States' defense of their interest may therefore be more vigorous than would that of DOE.

Finally, timeliness is a requirement committed to the discretion of the district court in light of all the circumstances. *Piambino v. Bailey*, 610 F.2d 1306 (5th Cir. 1980), and may be proper even after a judgment has been entered. *Nevilles v. EEOC*, 511 F.2d 303 (8th Cir. 1975). In this case the court, at the request of DOE and Exxon, had stayed earlier motions to intervene by industry applicants pending resolution of the issue of Exxon's liability for the overcharges. The interest which the States seek to defend is in the overcharge escrow fund to be created pursuant to the Memorandum Opinion. Accordingly, the applications for intervention, all filed within a few weeks of that Memorandum Opinion, cannot be denied as untimely.

In order to avoid undue delay, however, the scope of the applicants' intervention shall be limited to the question of the proper remedy in this case. The district court has the

power to limit intervention. *Smuck v. Hobson, supra*, at 179-80; *cf. United States v. AT&T, supra*, at 1291 (the limited nature of the intervenor's interest determines the scope of intervention). Moreover, in this case none of the applicants has requested the right to intervene with respect to the underlying substantive issues of Exxon's liability for the overcharges. Instead, each seeks to advance its claim to restitution of those overcharges. Accordingly, intervention by the industry applicants shall be solely for the purpose of arguing the remedy issue on appeal before the TECA. The States may intervene for the same purpose but they will be permitted, in addition, to submit comments on DOE's proposed judgment and Exxon's reply thereto. The States' comments shall be limited, however, to ensuring disbursement of the funds in accordance with the procedures described in the Memorandum Opinion, and shall not address the several substantive arguments on the merits by which Exxon contends that the amount of its liability ought to be reduced.

An appropriate Order accompanies this Memorandum.

/s/ Thomas A. Flannery
United States District Judge

Civil Action No. 78-1035
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
Plaintiff,
v.
EXXON CORPORATION,
Defendant.
Filed April 29, 1983

ORDER

In accordance with the foregoing Memorandum, it is, by the court, this 29th day of April, 1983,

ORDERED that the following applications for intervention in this case shall be, and hereby are, granted:

A. Industry Intervenors

(1) Marathon Petroleum Company, Mobil Oil Corporation, and Murphy Oil Corporation;

(2) The National Oil Jobbers Council and the "Jobbers' Group";

B. States

(1) Alabama, California, Illinois, Michigan, Mississippi and Ohio;

(2) Arkansas, Delaware, Iowa, Kansas, Louisiana, North Dakota, Rhode Island and Texas;

(3) New York;

(4) Commonwealth of Pennsylvania;

and it is further

ORDERED that the motion by Arkansas, Delaware, Iowa, Kansas, Louisiana, North Dakota, Rhode Island

and Texas for certification of a class consisiting of all States not otherwise represented by counsel before this court is denied; and it is further

ORDERED that the Industry Intervenors may intervene solely for the purpose of appeal on the issue of the proper remedy in this case; and it is further

ORDERED that the States may intervene only for the purpose of appeal on the issue of the proper remedy in this case and for the purpose of submitting comments to this court on the parties' proposed judgment, which comments shall be limited to ensuring disbursement of funds from the escrow account described in this court's Memorandum Opinion of March 25, 1983 in accordance with the procedures described therein; and it is further

ORDERED that the States shall submit their comments on the proposed judgment no later than May 9, 1983; and it is further

ORDERED that plaintiff and defendant shall no later than May 9, 1983 respond to the petition for limited intervention filed January 20, 1983 by Luther Griffin t/a Palmer Highway Exxon, *et al.* (the "Retailers").

/s/ Thomas A. Flannery
United States District Judge

APPENDIX D-7

Civil Action No. 78-1035
IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
Plaintiff

v.

EXXON CORPORATION,
Defendant
AIR TRANSPORT ASSOCIATION OF AMERICA,
Applicant for Intervention
Filed July 6, 1983

ORDER

Upon consideration of the Motion to Intervene and the Points and Authorities in Support of said Motion, it is by the Court this 6th day of July, 1983,

ORDERED that the Motion to Intervene be and the same hereby is granted pursuant to Rule 24(a) of the Federal Rules of Civil Procedure; and it is further

ORDERED that the Air Transport Association of America be made an intervenor in this proceeding only for purposes of appeal on the issue of the proper remedy in this case.

/s/ Thomas A. Flannery
United States District Judge

APPENDIX E

CONSTITUTIONAL PROVISION

Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX F-1

ECONOMIC STABILIZATION ACT AMENDMENT OF 1971
Pub. L. 92-210, 85 Stat. 743
12 U.S.C. Section 1904 note (1976)

"§ 209. Injunctions and other relief

"Whenever it appears to any person authorized by the President to exercise authority under this title that any individual or organization has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any order or regulation under this title, such person may request the Attorney General to bring an action in the appropriate district court of the United States to enjoin such acts or practices, and upon a proper showing a temporary restraining order or a preliminary or permanent injunction shall be granted without bond. Any such court may also issue mandatory injunctions commanding any person to comply with any such order or regulation. In addition to such injunctive relief, the court may also order restitution of moneys received in violation of any such order or regulation.

"§ 210. Suits for damages or other relief

"(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

"(b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff,

the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:

"(1) an amount not more than three times the amount of the overcharge upon which the action is based, or

"(2) not less than $100 or more than $1,000;

except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited to the amount of the overcharge: *Provided*, That where the overcharge is not willful within the meaning of section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller or renter a bona fide claim for refund of the overcharge and has not received repayment of such overcharge within ninety days from the date of the presentation of such claim.

"(c) For the purposes of this section, the term 'overcharge' means the amount by which the consideration for the rental of property or the sale of goods or services exceeds the applicable ceiling under regulations or orders issued under this title.

"§ 211. Judicial review

"(a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy; except that nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based

on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court. If in any such proceeding an issue by way of defense is raised based on the constitutionality of this title or the validity of agency action under this title, the case shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of chapter 89 of title 28, United States Code.

"(b)(1) There is hereby created a court of the United States to be known as the Temporary Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Temporary Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. Except as provided in subsection (d)(2) of this section, the court shall not have power to issue any interlocutory decree staying or restraining in whole or in part any provision of this title, or the effectiveness of any regulation or order issued thereunder. In all other respects, the court shall have the powers of a circuit court of appeals with respect to the jurisdiction conferred on it by this title. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases over which it has jurisdiction under this title. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

"(2) Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder. Such appeals shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of judgment by the district court.

"(c) In any action commenced under this title in any district court of the United States in which the court determines that a substantial constitutional issue exists, the court shall certify such issue to the Temporary Emergency Court of Appeals. Upon such certification, the Temporary Emergency Court of Appeals shall determine the appropriate manner of disposition which may include a determination that the entire action be sent to it for consideration or it may, on the issues certified, give binding instructions and remand the action to the certifying court for further disposition.

"(d)(1) Subject to paragraph (2), no regulation of any agency exercising authority under this title shall be enjoined or set aside, in whole or in part, unless a final judgment determines that the issuance of such regulation was in excess of the agency's authority, was arbitrary or capricious, or was otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code, and no order of such agency shall be enjoined or set aside, in whole or in part, unless a final judgment determines that such order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

"(2) A district court of the United States or the Temporary Emergency Court of Appeals may enjoin temporarily or permanently the application of a particular

regulation or order issued under this title to a person who is a party to litigation before it. Appeals from interlocutory decisions by a district court of the United States under this paragraph may be taken in accordance with the provisions of section 1292(b) of title 28, United States Code; except that reference in such section to the courts of appeals shall be deemed to refer to the Temporary Emergency Court of Appeals.

"(e)(1) Except as provided in subsection (d) of this section, no interlocutory or permanent injunction restraining the enforcement, operation, or execution of this title, or any regulation or order issued thereunder, shall be granted by any district court of the United States or judge thereof. Any such court shall have jurisdiction to declare (A) that a regulation of an agency exercising authority under this title is in excess of the agency's authority, is arbitrary or capricious, or is otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code, or (B) that an order of such agency is invalid upon a determination that the order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

"(2) Any party aggrieved by a declaration of a district court of the United States respecting the validity of any regulation or order issued under this title may, within thirty days after the entry of such declaration, file a notice of appeal therefrom in the Temporary Emergency Court of Appeals. In addition, any party believing himself entitled by reason of such declaration to a permanent injunction restraining the enforcement, operation, or execution of such regulation or order may file, within the same thirty-day period, a motion in the Temporary Emergency Court of Appeals requesting such injunctive relief. Following consideration of such appeal or motion, the Temporary Emergency Court of Appeals shall enter a

final judgment affirming, reversing, or modifying the determination of the district court and granting such permanent injunctive relief, if any, as it deems appropriate.

"(f) The effectiveness of a final judgment of the Temporary Emergency Court of Appeals enjoining or setting aside in whole or in part any provision of this title, or any regulation or order issued thereunder, shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (g) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the action by the Supreme Court.

"(g) Within thirty days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United States Code. The Temporary Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Temporary Emergency Court of Appeals, shall have exclusive jurisdiction to determine the constitutional validity of any provision of this title or of any regulation or order issued under this title. Except as provided in this section, no court, Federal or State, shall have jurisdiction or power to consider the constitutional validity of any provision of this title or of any such regulation or order, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this title authorizing the issuance of such regulations or orders, or

any provision of any such regulation or order, or to restrain or enjoin the enforcement of any such provision.

"(h) The provisions of this section apply to any actions or suits pending in any court, Federal or State, on the date of enactment of this section in which no final order or judgment has been rendered. Any affected party seeking relief shall be required to follow the procedures of this title.

APPENDIX F-2

EMERGENCY PETROLEUM ALLOCATION ACT OF 1973, Pub.L. 93-159, 87 Stat. 627 (1973)

Sec. 4. (a) Not later than fifteen days after the date of enactment of this Act, the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation. Subject to subsection (f), such regulation shall take effect not later than fifteen days after its promulgation. Except as provided in subsection (e) such regulation shall apply to all crude oil, residual fuel oil, and refined petroleum products produced in or imported into the United States.

(b)(1) The regulation under subsection (a), to the maximum extent practicable, shall provide for —

(A) protection of public health, safety, and welfare (including maintenance of residential heating, such as individual homes, apartments, and similar occupied dwelling units), and the national defense;

(B) maintenance of all public services (including facilities and services provided by municipally, cooperatively, or investor owned utilities or by any State or local government or authority, and including transportation facilities and services which serve the public at large);

(C) maintenance of agricultural operations, including farming, ranching, dairy, and fishing activities, and services directly related thereto;

(D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the

producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;

(E) the allocation of suitable types, grades, and quality of crude oil to refineries in the United States to permit such refineries to operate at full capacity;

(F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;

(G) allocation of residual fuel oil and refined petroleum products in such amounts and in such manner as may be necessary for the maintenance of exploration for, and production or extraction of, fuels, and for required transportation related thereto;

(H) economic efficiency; and

(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

(2) In specifying prices (or prescribing the manner for determining them), such regulation shall provide for—

(A) a dollar-for-dollar passthrough of net increases in the cost of crude oil, residual fuel oil, and refined petroleum products to all marketers or distributors at the retail level; and

(B) the use of the same date in the computation of markup, margin, and posted price for all marketers

or distributors of crude oil, residual fuel oil and refined petroleum products at all levels of marketing and distribution.

(3) The President in promulgating the regulation under subsection (a) shall give consideration to allocating crude oil, residual fuel oil, and refined petroleum products in a manner which results in making available crude oil, residual fuel oil, or refined petroleum products to any person whose use of fuels other than crude oil, residual fuel oil, and refined petroleum products has been curtailed by, or pursuant to a plan filed in compliance with, a rule or order of a Federal or State agency, or where such person's supply of such other fuels is unobtainable by reason of an abandonment of service permitted or ordered by a Federal or State agency.

(c)(1) To the extent practicable and consistent with the objectives of subsections (b) and (d), the mandatory allocation program established under the regulation under subsection (a) shall be so structured as to result in the allocation, during each period during which the regulation applies, of each refined petroleum product to each branded independent marketer, each nonbranded independent marketer, each small refiner and each independent refiner, and of crude oil to each small refiner and each independent refiner, in an amount not less than the amount sold or otherwise supplied to such marketer or refiner during the corresponding period of 1972, adjusted to provide—

(A) in the case of refined petroleum products, a pro rata reduction in the amount allocated to each person engaged in the marketing or distribution of a refined petroleum product if the aggregate amount of such product produced in and imported into the United States is less than the aggregate amount produced and imported in calendar year 1972; and

(B) in the case of crude oil, a pro rata reduction in the amount of crude oil allocated to each refiner if the aggregate amount produced in and imported into the United States is less than the aggregate amount produced and imported in calendar year 1972.

(2)(A) The President shall report to the Congress monthly, beginning not later than January 1, 1974, with respect to any change after calendar year 1972 in—

(i) the aggregate share of nonbranded independent marketers,

(ii) the aggregate share of branded independent marketers, and

(iii) the aggregate share of other persons engaged in the marketing or distributing of refined petroleum products,

of the national market or the regional market in any refined petroleum product (as such regional markets shall be determined by the President).

(B) If allocation of any increase of the amount of any refined petroleum product produced in or imported into the United States in excess of the amount produced or imported in calendar year 1972 contributes to a significant increase in any market share described in clause (i), (ii), or (iii) of subparagraph (A), the President shall by order require an equitable adjustment in allocations of such product under the regulation under subsection (a).

(3) The President shall, by order, require such adjustments in the allocations of crude oil, residual fuel oil, and refined petroleum products established under the regulation under subsection (a) as may reasonably be necessary (A) to accomplish the objectives of subsection (b), or (B) to prevent any person from taking any action which would be inconsistent with such objectives.

(4) The President may, by order, require such adjustments in the allocations of refined petroleum products and crude oil established under the regulation under subsection (a) as he determines may reasonably be necessary—

(A) in the case of refined petroleum products (i) to take into consideration market entry by branded independent marketers and nonbranded independent marketers during or subsequent to calendar year 1972, or (ii) to take into consideration expansion or reduction of marketing or distribution facilities of such marketers during or subsequent to calendar year 1972, and

(B) in the case of crude oil (i) to take into consideration market entry by independent refiners and small refiners during or subsequent to calendar year 1972, or (ii) to take into consideration expansion or reduction of refining facilities of such refiners during or subsequent to calendar year 1972.

Any adjustments made under this paragraph may be made only upon a finding that, to the maximum extent practicable, the objectives of subsections (b) and (d) of this section are attained.

(5) To the extent practicable and consistent with the objectives of subsections (b) and (d), the mandatory allocation program established under the regulation under subsection (a) shall not provide for allocation of LPG in a manner which denies LPG to any industrial user if no substitute for LPG is available for use by such industrial user.

(d) The regulation under subsection (a) shall require that crude oil, residual fuel oil, and all refined petroleum products which are produced or refined within the United States shall be totally allocated for use by ultimate users

within the United States, to the extent practicable and necessary to accomplish the objectives of subsection (b).

(e) (1) The provisions of the regulation under subsection (a) shall specify (or prescribe a manner for determining) prices of crude oil at the producer level, but, upon a finding by the President that to require allocation at the producer level (on a national, regional, or case-by-case basis) is unnecessary to attain the objectives of subsection (b)(1)(E) or the other objectives of subsections (b), (c), and (d) of this section, such regulation need not require allocation of crude oil at such level. Any finding made pursuant to this subsection shall be transmitted to the Congress in the form of a report setting forth the basis for the President's finding that allocation at such level is not necessary to attain the objectives referred to in the preceding sentence.

(2)(A) The regulation promulgated under subsection (a) of this section shall not apply to the first sale of crude oil produced in the United States from any lease whose average daily production of crude oil for the preceding calendar year does not exceed ten barrels per well.

(B) To qualify for the exemption under this paragraph, a lease must be operating at the maximum feasible rate of production and in accord with recognized conservation practices.

(C) Any agency designated by the President under section 5(b) for such purpose is authorized to conduct inspections to insure compliance with this paragraph and shall promulgate and cause to be published regulations implementing the provisions of this paragraph.

(f)(1) The provisions of the regulation under subsection (a) respecting allocation of gasoline need not take effect until thirty days after the promulgation of such regulation, except that the provisions of such regulation

respecting price of gasoline shall take effect not later than fifteen days after its promulgation.

(2) If—

(A) an order or regulation under section 203(a)(3) of the Economic Stabilization Act of 1970 applies to crude oil, residual fuel oil, or a refined petroleum product and has taken effect on or before the fifteenth day after the date of enactment of this Act, and

(B) the President determines that delay in the effective date of provisions of the regulation under subsection (a) relating to such oil or product is in the public interest and is necessary to effectuate the transition form the program under such section 203(a)(3) to the mandatory allocation program required under this Act,

he may in the regulation promulgated under subsection (a) of this section delay, until not later than thirty days after the date of the promulgation of the regulation, the effecitve date of the provisions of such regulation insofar as they relate to such oil or product. At the same time the President promulgates such regulation, he shall report to Congress setting forth his reasons for the action under this paragraph.

(g)(1) The regulation promulgated and made effective under subsection (a) shall remain in effect until midnight February 28, 1975, except that (A) the President or his delegate may amend such regulation so long as such regulation, as amended, meets the requirements of this section, and (B) the President may exempt crude oil, residual fuel oil, or any refined petroleum product from such regulation in accordance with paragraph (2) of this subsection. The authority to promulgate and amend the regula-

tion and to issue any order under this section, and to enforce under section 5 such regulation and any such order, expires at midnight February 28, 1975, but such expiration shall not affect any action or pending proceedings, civil or criminal, not finally determined on such date, nor any action or proceeding based upon any act committed prior to midnight February 28, 1975.

(2) If at any time after the date of enactment of this Act the President finds that application of the regulation under subsection (a) to crude oil, residual fuel oil, or a refined petroleum product is not necessary to carry out this Act, that there is no shortage of such oil or product, and that exempting such oil or product from such regulation will not have an adverse impact on the supply of any other oil or refined petroleum products subject to this Act, he may prescribe an amendment to the regulation under subsection (a) exempting such oil or product from such regulation for a period of not more than ninety days. The President shall submit any such amendment and any such findings to the Congress. An amendment under this paragraph may not exempt more than one oil or one product. Such an amendment shall take effect on a date specified in the amendment, but in no case sooner than the close of the earliest period which begins after the submission of such amendment to the Congress and which includes at least five days during which the House was in session and at least five days during which the Senate was in session; except that such amendment shall not take effect if before the expiration of such period either House of Congress approves a resolution of that House stating in substance that such House disapproves such amendment.

ADMINISTRATION AND ENFORCEMENT

Sec. 5. (a)(1) Except as provided in paragraph (2), (A) sections 205 through 211 of the Economic Stabilization Act of 1970 (as in effect on the date of enactment of this Act) shall apply to the regulation promulgated under section 4(a), to any order under this Act, and to any action taken by the President (or his delegate) under this Act, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970, and (B) section 212 (other than 212(b)) and 213 of such Act shall apply to functions under this Act to the same extent such sections apply to functions under the Economic Stabilization Act of 1970.

(2) The expiration of authority to issue and enforce orders and regulations under section 218 of such Act shall not affect any authority to amend and enforce the regulation or to issue and enforce any order under this Act, and shall not effect any authority under sections 212 and 213 insofar as such authority is made applicable to functions under this Act.

(b) The President may delegate all or any portion of the authority granted to him under this Act to such officers, departments, or agencies of the United States, or to any State (or officer thereof), as he deems appropriate.

APPENDIX F-3

WARNER AMENDMENT
Section 155 of Pub. L. 97-377,
96 Stat. 1830 (1982)

SEC. 155. (a) It is the purpose of this section to provide the Secretary of Energy the exclusive authority for the disbursement of the designated petroleum violation escrow funds for limited restitutional purposes (1) which are reasonably expected to benefit the class of persons injured by such violations, and (2) which, based on information previously provided to Congress by the Secretary of Energy, are likely not to be, through procedures established by regulation, otherwise refunded to injured persons because the purchasers of the refined petroleum products cannot be reasonably identified or paid or because the amount of each purchaser's overcharge is too small to be capable of reasonable determination.

(b) As soon as practicable, the Secretary of Energy shall disburse designated petroleum violation escrow funds to the Governors of the States in accordance with the formula set forth in subsection (d).

(c) Amounts disbursed to the Governor of any state shall be used by the Governor as if such funds were received under one or more energy conservation programs. The Governor shall identify to the Secretary within one year after the time of disbursement the energy conservation program or programs to which the funds are or will be applied. Funds disbursed under this section shall be used to supplement, and not supplant, funds otherwise available for such programs under Federal or State law.

(d) The disbursement by the Secretary of Energy to each State shall be based on the ratio, calculated by the Secretary, which —

(1) the volume of refined petroleum products consumed within that State during the period beginning September 1, 1973, and ending January 28, 1981, bears to

(2) the volume of refined petroleum products consumed within all States during such period.

Calculations made by the Secretary of Energy under this subsection shall be based upon estimates by the Secretary from reasonably available information.

(e) For purposes of this section —

(1) The term "designated petroleum violation escrow funds" means amounts (not in excess of $200,000,000) which are derived from settlements from alleged petroleum pricing and allocation violations generally resulting in overcharges to purchasers of refined petroleum products and held in trust accounts administered by the Department of Energy on December 17, 1982, and which —

(A) are not likely to be required for satisfying claims of potential claimants identified in the proceedings of the Office of Hearings and Appeals initiated prior to December 17, 1982, or identified in judicial proceedings initiated prior to such date; and

(B) the use of under this section would be consistent with the remedial order or consent order covering such funds.

(2) The term "energy conservation programs" means —

(A) the program under Part A of the Energy Conservation and Existing Buildings Act of 1976 (42 U.S.C. 6861 and following);

(B) The programs under part D of title III of the Energy Policy and Conservation Act (relating to primary and supplemental State energy conservation programs; 42 U.S.C. 6321 and following);

(C) the program under part G of title III of Energy Policy and Conservation Act (relating to energy conservation for schools and hospitals; 42 U.S.C. 6371 and following);

(D) program under the National Energy Extension Service Act (42 U.S.C. 7001 and following); and

(E) the program under the Low-Income Home Energy Assistance Act of 1981 (42 U.S.C. 8621 and following).

(3) The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(4) The term "Governor", when used with respect to any State, means the Governor or the chief executive officer of that State.

(5) The term "refined petroleum product" means gasoline, kerosene, distillates, (including Number 2 fuel oil), LPG (other than ethane), refined lubricating oils, diesel fuel, and residual fuel oil, but does not include refinery feedstocks.

(f) No funds disbursed under this section may be used for any administrative expenses of the Department of

Energy or of any State, whether incurred in connection with any energy conservation program or otherwise.

APPENDIX G

Report to the
United States District Court for the
District of Kansas
In re Department of Energy
Stripper Well
Exemption Litigation
MDL No. 378
U.S. Department of Energy
Office of Hearings and Appeals
Washington, D.C. 20585
June 1985

A-321

MDL No. 378

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

In re Department of Energy
Stripper Well
Exemption Litigation

Report of the
Office of Hearings and Appeals
of the Department of Energy

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I.

Introduction

On September 13, 1983, United States District Judge Frank G. Theis referred the remedy stage of The Department of Energy Stripper Well Exemption Litigation, MDL No. 378 (D. Kan.), to the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) for fact-finding to try to determine who bore the impact of overcharges at issue in this litigation and in what amounts. In addition, the court requested OHA's suggestion regarding an appropriate restitutionary plan. On May 7, 1985, the District Court issued an order which clarified the manner in which the fact-finding report from OHA was to be submitted. *In re: The Department of Energy Stripper Well Exemption Litigation,* MDL No. 378 (D. Kan., May 7, 1985) (order denying motion to expedite issuance of OHA's report). In that decision, the court ordered the OHA to issue its findings of fact on the tracing and impact of the overcharges in one separate report without editing or modification by the DOE. *Id., slip op.* at 7. Recognizing that the DOE's position on the utility of further efforts by the OHA and a recommended plan of restitution was a matter of agency policy, the court directed that these concerns be addressed in a second report "which shall be issued separate from the report of the OHA's fact-findings." *Id.* This report sets forth the OHA's analysis and findings of fact regarding the absorption of the impact of these crude oil overcharges by the U.S. domestic refining industry.

The Department of Energy Stripper Well Exemption Litigation began as a challenge by a number of crude oil producers to certain crude oil price regulations. If the position of the producers had been sustained, they would have been permitted to certify certain crude oil as stripper well crude oil and sell it at significantly higher prices. (Crude oil from "stripper well" properties that produced less than 10 barrels of oil per well per day was exempt from price controls. The producers in the litigation

claimed that injection wells — wells not producing crude oil — should be counted in determining the number of wells per property.) The Department of Energy maintained that the producers should not be permitted to count injection wells for purposes of the stripper well exemption. At an initial stage of the litigation, the District Court enjoined enforcement of those regulations, but required the crude oil producers to deposit into escrow the difference between the higher price they received and the lower price they would have received if the agency's position were enforced.

The issue of the validity of the agency's position was settled in *In re The Department of Energy Stripper Well Exemption Litigation,* 690 F.2d 1375 (Temp. Emer. Ct. App. 1982), *cert. denied,* 459 U.S. 1127 (1983). In that decision the Temporary Emergency Court of Appeals upheld the agency's position that only wells from which oil was actually pumped could be counted in determining a property's eligibility for the stripper well exemption and directed that the District Court enter judgment in favor of the DOE. As the District Court noted in its September 13 memorandum opinion,

> The effect of TECA's decision is to declare the funds deposited in escrow to be overcharges received due to violations of the petroleum pricing regulations. The remaining task is the appropriate dispensation of the escrowed funds. . . .

In re The Department of Energy Stripper Well Exemption Litigation, 578 F. Supp. 586, 589 (D. Kan. 1983) (hereinafter cited as Referral Decision).

In view of the nature of the overcharges involved in this proceeding, the DOE moved the District Court to refer the issue of the appropriate remedy to the OHA. In its motion, the DOE argued that the remedy issues are complex and that the validity of certain claims would depend upon an analysis of the extent to which a claimant could pass through increased costs associated with the

overcharges. In this regard, the agency pointed out that the effect of DOE regulations, including the impact of the Crude Oil Entitlements Program, 10 C.F.R. § 211.67, and the ability of refiners and resellers of petroleum products to "bank" increased costs and pass them through in subsequent time periods, would need to be analyzed. The court decided to refer the remedy issues to the OHA.

In its referral decision, the court considered and resolved two preliminary questions:

> 1. Are any parties other than the first purchasers or participants in the Entitlements Program entitled to refunds?
>
> 2. Is it clearly impossible to ascertain particular harms suffered by particular parties by virtue of the overcharges?

Referral Decision at 591. With regard to the first question, the court held that refunds should not, as a matter of law, be limited to first purchasers or the participants in the Entitlements Program. The court recognized that it was first necessary to try and determine whether these two groups of claimants passed through the MDL 378 overcharges to their downstream customers. Passthrough of the crude oil overcharges was germane for several reasons. First, the court noted a distinction between: (i) private lawsuits under the antitrust laws and Section 210 of the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. § 1904 note; and (ii) this case which, in effect, has become a government enforcement action under Section 209 of the ESA to recover overcharges. The courts have generally refused to consider questions of passthrough in the former types of cases, reasoning that the difficulty of the task would discourage private litigants from seeking to vindicate their rights. In the present case, however, the court noted that there is no need to encourage private enforcement since this is, in effect, an enforcement action by the government. Furthermore, the court held that under the

equitable doctrine of restitution, which governs the remedy issues in this action, "allowing first purchasers to retain all of the overcharges, particularly in the absence of a factual showing that they did not pass on some or all of the overcharges, would not be an equitable result." Referral Decision at 594.

The court also rejected a proposal to distribute the overcharges immediately to state governments. That type of distribution had been suggested in a similar case in which the District Court held that it was impossible to determine injured parties. *United States v. Exxon Corp.*, 561 F. Supp. 816 (D.D.C. 1983); *appeal docketed*, No. DC-91 et seq. (Temp. Emer. Ct. App. June 23, 1983). The court observed that the Temporary Emergency Court of Appeals has stated that "the Government has a *duty* to try to ascertain those overcharged, and refund them, with interest, from the restitution funds." *Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717, 723 (Temp. Emer. Ct. App.), *cert. denied*, 459 U.S. 877 (1982). The court held that a distribution to state governments would be premature, since the record in this case did not include any factual basis for the conclusion that it was impossible to determine with any particularity who bore the adverse effects of the overcharges. Referral Decision at 595.

In summary, the court stated its view that ascertaining the impact of the overcharges resulting from crude oil certification violations "involves complicated and technical questions of fact, compounded by the impact of regulatory phenomena such as the Entitlements Program and the 'banking' of costs." Referral Decision at 596. As a result, it referred the matter to the Office of Hearings and Appeals for the task of attempting to determine who bore the impact of the overcharges and in what amounts.

II.

Regulatory Background

A. Crude Oil Price Regulations

From August 19, 1973 until January 28, 1981, the federal government imposed controls on the price and allocation of crude oil. The price regulations pertaining to the first sale of domestic crude oil, including crude oil condensate, were based on production and sales from a given property. Those regulations generally required crude oil producers to determine the first sale price of crude oil on the basis of the relationship between current production from a property and the base production control level (BPCL), i.e. the production from that property during a specified base period. *See* 6 C.F.R. § 150.354; 10 C.F.R. §§ 212.72 and 212.76. Crude oil production that did not exceed the BPCL for a particular property was generally subject to the lower tier ("old" oil) ceiling price rule. 6 C.F.R. § 150.354; 10 C.F.R. § 212.73. Crude oil production that exceeded the sum of the BPCL and any deficiency in the BPCL that had accumulated from production in prior months was deemed "new" oil and could be sold without regard to the ceiling price rule prior to February 1, 1976, and at the upper tier ceiling price level after that date. 6 C.F.R. § 150.354(c)(2); 10 C.F.R. § 212.74(a); *see* 41 Fed. Reg. 4931 (1976). Before February 1, 1976, if new oil could be sold from a property in a particular month, additional volumes of crude oil could be sold as "released" oil at prices in excess of the applicable ceiling price level. 6 C.F.R. § 150.354; 10 C.F.R. § 212.74.

In addition, from November 16, 1973 through January 27, 1981, excepting the period from February 1 through August 31, 1976, crude oil produced from a stripper well property was exempt from price controls. 6 C.F.R. § 150.54(s); 10 C.F.R. § 212.54. From February 1 through August 31, 1976, crude oil produced from stripper well properties was subject to the upper tier ceiling price rule

codified at 10 C.F.R. § 212.74. Throughout the period of controls, a stripper well property was defined as a property whose average daily production of crude oil did not exceed ten barrels per well during a qualifying period. 10 C.F.R. §§ 210.32(b) and 212.54(c).

B. Crude Oil Entitlements Program

The DOE's Crude Oil Entitlements Program, which was in effect between November 1974 and January 1981, was intended to generally equalize access to the benefits of crude oil price controls among all domestic refiners. Because of the way the program worked, it also had the effect of dispersing overcharges resulting from crude oil miscertifications throughout the domestic refining industry. It is this one feature of the Entitlements Program that makes this case unique in the annals of damage litigation. (A miscertification declared a particular quantity of crude oil to belong to an incorrect tier. Ceiling prices for crude oil depended on the tier in which the crude oil was classified.) A refiner who was a direct purchaser from one of the producers involved in this litigation, and paid an increased amount for the miscertified MDL 378 crude oil, generally recouped the increased crude oil costs resulting from the miscertifications through the Entitlements Program. This result occurred because when the refiner reported the purchase of a barrel of MDL 378 crude as stripper well oil instead of price-controlled oil, that refiner received additional entitlement benefits. The additional entitlement benefits generally compensated for the difference between the higher price paid for the miscertified crude oil and the price that refiner should lawfully have paid.

The effect of crude oil miscertifications (e.g., certifying price-controlled crude oil as stripper well crude oil) on the Entitlements Program has been discussed at length in a number of administrative and judicial decisions. *See, e.g., Union Oil Co. v. DOE*, 688 F.2d 797 (Temp. Emer. Ct. App. 1982), *cert. denied*, 459 U.S. 1202 (1983); *Office of*

Enforcement, 9 DOE ¶ 82,553 (1982). For example, in *Office of Enforcement*, 9 DOE ¶ 82,521 (1982), we stated that:

> Because of the manner in which the Entitlements Program operated, the effects of the miscertifications were spread among all domestic refiners. Miscertifications caused price-controlled crude oil to disappear. This disappearance caused the volume of old oil to be distributed through the Entitlements Program to decline and caused the DOSR [domestic old oil supply ratio] to be reduced. Thus, refiners who included more than the national average percentage of price-controlled oil in their crude oil receipts and runs to stills had to purchase a *greater* number of entitlements. Similarly, refiners with less than the national average percentage of price-controlled crude oil had *fewer* entitlements to sell. As a result, every refiner's cost of crude oil was increased. Thus, all refiners were affected by the alleged miscertification violations involved in the Consent Orders.

Id. at 85,133, *quoting Office of Enforcement*, No. DFF-0002, slip op. at 5-6 (proposed decision May 8, 1981).

C. Refiner Price Rule Generally

Under the DOE price regulations, 10 C.F.R. Part 212, Subpart E, each refiner was generally permitted to charge a price that reflected its May 15, 1973 price levels plus a dollar-for-dollar passthrough of increased costs. If market conditions would not allow a refiner to charge the maximum lawful price level permitted under the regulations, unrecouped increased costs could be "banked," and carried forward for recovery in a subsequent month. Thus, the refiner price rule permitted a refiner to pass through increased crude oil costs to the extent market conditions allowed. The significance of these "cost banks" calculated by refiners is discussed later in this report.

III.

OHA Preliminary Proceedings

From the beginning of the remedy phase of this litigation, the claimants have advanced many different theories. In the words of the court:

> Like flies to honey, claimants are quickly drawn by a fund containing over one billion dollars. These claimants have radically differing notions as to how the fund should be distributed, with one factor common to all suggested approaches: each claimant, unsurprisingly, desires a methodology of distribution likely to result in a large percentage of the fund being deposited into said claimant's pockets.

Referral Decision at 589. It was apparent to the OHA that the best place to test the theories advanced by the competing claimants was in an evidentiary forum.

The OHA's first formal action in response to the referral by this court was the issuance of a notice on December 12, 1983, announcing the procedures it intended to follow in the fact-finding process. That notice was published in the *Federal Register* on December 30, 1983. 48 Fed. Reg. 57,608 (1983). In addition to establishing procedures and soliciting comments, the notice indicated that the proceeding would focus first on injury to refiners. With regard to this question, the notice proposed a number of analytic methods that could be used to determine whether refiners bore the impact of the overcharges and, if so, in what amounts. These methods had been suggested by state governments and refiners in other crude oil refund proceedings before the OHA, and they were offered in the notice as a starting point on the analytic road. They included: (i) the District Court's approach in *United States v. Exxon Corp.*, 561 F. Supp 816 (D.D.C. 1983), *appeal docketed*, No. DC-91 et seq. (Temp. Emer. Ct. App. June 23, 1983); (ii) an analysis of refiners' per-barrel profits; (iii) an analysis of refiners' cost banks; and (iv) marginal economic analysis. All of these methods were

addressed by the participants at the evidentiary hearings later held in this proceeding. Although the OHA indicated that it would consider other theories, no one has offered a new approach to the question under analysis.

On March 13, 1984, the OHA filed an interim report with this court. In that report the OHA noted the general agreement among OHA and the parties that relevant facts regarding the impact of the overcharges should be examined at each level in the chain of distribution for petroleum products.

In a decision issued on May 2, 1984, the OHA directed that a hearing be convened to receive evidence on the impact of the overcharges upon direct purchasers of the MDL 378 crude oil and the refiner level of the petroleum industry. A copy of that decision was published in the *Federal Register*. 49 Fed. Reg. 19,718 (1984). Parties retained experts who began preparing testimony. A prehearing conference was held on June 8, 1984, to discuss the procedures that would govern the evidentary hearing. Final procedures were issued in June 1984, documentary evidence was exchanged in July, and the evidentiary hearing began on August 7, 1984.

IV
The Evidentiary Proceeding

Four senior members of the Office of Hearings and Appeals comprised the hearing panel. Numerous participants appeared at the hearing, including 19 refiners, two public utilities, trade associations representing marketers of refined products, the Air Transport Association of America, the National Council of Farmer Cooperatives, and state governments (41 states, the District of Columbia, the Territory of Guam, and the Virgin Islands). Appendix A of this report contains a list of active participants in the OHA evidentiary proceeding.

A total of 21 witnesses initially testified and were cross-examined. Crude oil refiners called 12 witnesses. One witness was offered by marketers of petroleum prod-

ucts. End-users of petroleum products (airlines, utilities, and farmers), offered five witnesses, and three witnesses were called by state governments. Aside from the OHA, no other office of the Department of Energy participated in the hearing. The witnesses generally had backgrounds in economics, and most had doctoral degrees, significant business experience, or both. Their credentials are set forth in detail in the evidentary record. They offered opinions concerning the impact of crude oil overcharges on direct purchasers of MDL 378 crude oil and on Entitlements Program participants.

For analytic purposes, the testimony of the witnesses can be separated into four groups. A witness for Total Petroleum, Inc. testified that Total, a direct purchaser of MDL 378 crude oil, was not fully compensated for the overcharges by the Entitlements Program. Witnesses representing Tenneco Oil Company, Ashland Oil, Inc., Sun Company, Inc., Shell Oil Company, and the states advocated the use of refiner cost banks calculated pursuant to DOE regulations to measure the absorption of the MDL 378 overcharges by refiners. The third group of witnesses focused on the use of marginal economic analysis as a method to determine the amount of MDL 378 overcharges absorbed by Entitlements Program participants. The last group advocated the proposition that it was impossible to measure the impact of the overcharges by any method.

Paramount among the reasons for holding an evidentiary hearing in this case was the need to permit the parties to cross-examine opposing witnesses. Any weaknesses in the underpinnings of expert opinion testimony may be developed on cross-examination, *Polk v. Ford Motor Co.*, 529 F.2d 259, 271 (8th Cir.), *cert. denied*, 426 U.S. 907 (1976), and since these experts performed complex analytical procedures before arriving at highly technical conclusions, opposing parties were granted wide latitude in cross-examing the experts. *See generally W. D. Rubright Co. v. International Harvester Co.*, 358 F. Supp. 1388 (W.D. Pa. 1973).

In addition, the evidentiary hearing gave the members of the OHA hearing panel an opportunity to observe the demeanor of the witnesses and judge their credibility. *See genrally Anderson v. Bessemer City,* 470 U.S. ____, 105 S. Ct. 1504 (1985); *Wainwright v. Witt,* 469 U.S. ____, 105 S. Ct. 844 (1985); *Wellven, Inc. v. Gulf Oil Corp.,* 731 F.2d 892 (Temp. Emer. Ct. App. 1984); *Exxon Corp. v. DOE,* 601 F. Supp. 1395 (D. Del. 1985).

Extensive evidence was adduced through direct and cross-examination. The first portion of the hearing lasted fifteen working days. At its conclusion, the parties requested an opportunity to submit rebuttal testimony. The hearing was recessed for several weeks to allow participants adequate time to prepare for rebuttal. On September 17, 1984, the hearing was reconvened for the limited purpose of receiving rebuttal evidence. At the September hearing nine witnesses participated, all Ph.D. economists, econometricians or statisticians. Finally, after all evidence had been submitted, the parties filed briefs. Final oral arguments were heard on October 30, 1984.

The record in this proceeding has become quite extensive. It contains 12,958 pages. The transcript of oral presentations alone is 4,472 pages long: the transcript of the August hearing is 2,786 pages, the transcript of the September hearing is 1,519 pages, and the transcript of the oral argument is 167 pages. The documentary evidence is also voluminous. Initially, 23 evidentiary documents were submitted covering several thousand pages. Many of those submissions included detailed economic studies. At the August hearing, 114 exhibits were admitted into evidence. Many of these exhibits are computer-generated multiple regression analyses which use sophisticated statistical computer programs. Seventy-one exhibits were admitted into the record at the September hearing. The record now contains a total of 185 exhibits admitted at the evidentiary hearings. After all evidence had been presented, 23 briefs were filed. Twelve groups of parties participated in the oral argument.

V.

Absorption By Refiners

As noted above, a number of different approaches have been suggested to address the question of who bore the impact of the MDL 378 overcharges and in what amounts. As these overcharges flowed through the distribution chain from crude oil producer to refiner to ultimate consumer, they had the following economic effect. The direct purchaser of any miscertified crude oil, including MDL 378 crude oil, initially paid an unlawful price to a crude oil producer. If the analysis were to end there, each direct purchaser would be entitled to receive the amount of overcharges from the producer of the crude oil. However, as explained above, because of the operation of the Entitlements Program, the direct purchaser automatically received additional entitlements benefits which generally compensated it for the overcharges. The cost of these additional entitlements benefits was borne proportionately by all participants in the Program. As a result, each crude oil overcharge due to a miscertification in a particular month caused a small cost increase that was apportioned among all barrels of crude oil refiend in that month.

A. Direct Effects

The first step in the analysis of who bore the impact of the MDL 378 overcharges is to determine whether refiners who actually purchased the MDL 378 crude oil (direct purchasers) received additional benefits through the operation of the Entitlements Program that fully compensated them for the overcharges. A fully compensated direct purchaser would have received entitlements benefits equal to or greater than the difference between the price actually paid for MDL 378 crude oil and the lawful ceiling price of that oil. Most participants in this proceeding actually claimed injury through indirect effects, primarily the general increase in crude oil costs caused by the effect of the overcharges upon the Entitlements Pro-

gram. However, Total Petroleum presented detailed evidence in support of its argument that it was not fully compensated by the Entitlements Program for the overcharges on some of the MDL 378 crude oil which it purchased. *See* Doc. No. 184. Various major refiners advanced similar arguments. *See* Doc. No. 190. These claims require analysis.

There was general agreement at the hearings that during some of the months in which overcharges occurred, the theoretical possibility exists that some direct purchasers of MDL 378 crude oil did not receive additional entitlements benefits that fully compensated them for the increased crude oil costs associated with the MDL 378 overcharges. Doc. No. 190. It must be remembered, however, that the Entitlements Program was never intended to precisely equalize crude oil costs for all domestic refiners. The program calculated benefits for a particular refiner not on the basis of the prices it paid for crude oil in individual transactions, but on the basis of averages of the prices paid by all domestic refiners for the crude oil in each tier. In view of the Program's purpose, the use of averages was theoretically sound and administratively efficient as well. The Program was only designed to share the benefits of access to price-controlled crude oil. It was *not* designed to achieve precise crude oil cost equalization. In the real world, of course, due to quality and location differentials and many other factors, refiners paid prices for crude oil which deviated from the average price for crude oil of each tier. Thus, when a refiner paid a price for a particular quantity of crude oil which was below the average tier price, it was "overcompensated" by the Program with respect to that crude oil; if the refiner paid a price above the average tier price, it was "undercompensated" by the Entitlements Program. In the regulated market under the Entitlements Program, "overcompensation" and "undercompensation" on individual lots of crude oil were facts of life rather than aberrations, and they occurred every day. The use of average prices for each tier was also intended to preserve the incentive

which refiners had to search for the cheapest supplies of crude oil. *Asamera Oil (U.S.) Inc.*, 10 DOE ¶ 81,031 at 82,695 (1983).

The evidence presented by L. C. Ross, General Counsel of Total Petroleum, Inc., attempted to show that Total was not fully compensated for MDL 378 overcharges through the operation of the Entitlements Program. According to evidence submitted by Total, in some months it paid a price for the miscertified MDL 378 crude oil significantly above the tier average for all market price (uncontrolled) crude oil. Doc. No. 184. Mr. Ross's testimony also confirmed, however, that during certain months some of the miscertified crude oil involved in this case was priced *below* the average price for uncontrolled crude oil; in those instances, the direct purchaser of MDL 378 oil would have been overcompensated by the Entitlements Program, and clearly bore no impact of the overcharges as a direct purchaser.

Although the magnitude of the undercompensation on a particular purchase of MDL 378 oil could be calculated by using a methodology set forth by Mr. Ross, Doc. No. 184, at 3-7, a less complex method exists which will obtain the same information. That method involves comparing the price actually paid for MDL 378 crude oil with the sum of the applicable tier ceiling price for the properly-certified MDL 378 crude oil and the entitlement benefit for that tier during the relevant month:

Uncompensated amount = Amount actually paid
− (applicable tier ceiling price
+ tier entitlement benefit)

For example, according to Total's submission, in April 1980, Total paid $39.00 per barrel for 78,950 barrels of miscertified MDL 378 crude oil purchased from Sun Oil Co. and Muskegon Development Co. Doc. No. 184, Exh. No. 4. Had that crude oil been properly priced and certified, Total would have paid an upper tier ceiling price of $14.28 per barrel. Doc. No. 184, Exh. No. 3. It would

also have had to purchase a portion of an entitlement for each barrel of that crude oil, which portion in that month cost $17.83. In this instance, the "undercompensated amount" is $39.00 minus ($14.28 + $17.83), or $6.89 per barrel. Consequently, the total undercompensated amount on Total's April 1980 purchases of MDL 378 crude oil from Sun and Muskegon is $543,965.50 ($6.89 × 78,950 barrels).

This method tends to eliminate any amount of the "undercompensation" which is due to quality and location differentials since it compares the price actually paid with the ceiling price applicable to the very same crude oil. In addition, the method has several advantages over the one proposed by Mr. Ross. First, it is simpler. Second, it does not rely on the amount which should have been paid into the stripper well escrow account to determine the uncompensated amount. As we noted in our September 11, 1984 report to this court, there is considerable uncertainty whether the producers of MDL 378 crude oil have deposited the proper amounts into escrow. This method permits an analysis to move ahead without regard to the auditing and accounting which is proceeding separately under supervision of the court.

In an attempt to discredit the testimony of Mr. Ross, on cross-examination the states attempted to show that the prices paid by Total may not have been negotiated in arm's length transactions. For example, state representatives introduced a contract between Sun Oil Company (Delaware) and Total Petroleum, Inc., Ross (Cross-examination) Exh. No. 1, which they claimed cast doubt on the contention that the prices reportedly paid by Total to Sun for certain MDL 378 crude oil produced and sold from a field in Michigan were negotiated at arm's length. Transcript ("Tr.") at 54-61. They also suggested that one would need to determine whether the MDL 378 crude oil involved would have been produced in the absence of the overcharges. Tr. at 116. They claim that without the overcharges, the "stripper well" crude oil would have

been subject to controlled price levels that were significantly lower; if the economics of the individual properties involved were marginal, it might not have been profitable to produce and sell the oil involved at the lower price.

The evidence introduced by the states does not address the threshold question of determining whether direct purchasers of MDL 378 oil were fully compensated for the overcharges by the Entitlements Program. As indicated above, it appears that in certain cases there was not full compensation by the Program. However, the evidence they submitted is clearly relevant to a different and important question, *viz.*, whether direct purchasers of MDL 378 oil who may have been undercompensated for the overcharges by the Entitlements Program were actually *injured*.

A finding that a particular direct purchaser may not have been fully compensated by the Entitlements Program is only the first step in determining whether it was actually injured. In order to make the latter determination, it is necessary to consider a number of factors, including the following: (i) whether the purchase of miscertified stripper oil was linked to other transactions, either by joint contracts, tie-in arrangements, or intrafirm trades at transfer prices; (ii) whether the undercompensation was offset or reduced by overcompensation on other quantities of crude oil purchased by the claimant; (iii) whether the exempt price was determined at arm's length; (iv) whether the oil in question would have been produced if properly certified; (v) whether the MDL 378 oil in question was purchased from an affiliated entity; (vi) whether the proper amount has been deposited by the direct purchaser into the escrow account; (vii) had the oil been purchased at its properly certified price, the amount of any margin likely to have been taken by a crude oil reseller or broker participating in the transaction; and (viii) whether the refiner passed through the amount of the undercompensation by raising its prices for refined petroleum products to downstream purchasers. *See* Tr. at

114-17. The foregoing list is not meant to be exhaustive, and there could be other, similar issues that would have to be considered in individual cases to determine whether direct purchasers of the MDL 378 oil were actually injured. As a result, the argument of Total and others cannot be accepted in the form presented, and the record to date is inconclusive on whether individual direct purchasers of the MDL 378 crude oil were actually injured by the overcharges.

B. Indirect Effects Through Entitlements Program

Most parties to this proceeding did not claim injury due to direct effects of overcharges paid for a particular quantity of miscertified MDL 378 crude oil. Instead, most parties based their claims on the indirect effects of the overcharges as they were spread through the operation of the Entitlements Program. As noted previously, the Entitlements Program generally compensated direct purchasers for payment of the overcharges, and it was the participants in the Entitlements Program who provided that compensation and thereby bore the real initial impact of the crude oil cost increase caused by the overcharges.

In economic terms, the MDL 378 overcharges (like any other crude oil miscertification) reduced the volume of price-controlled crude oil distributed by the Entitlements Program and thus raised the cost of crude oil to all domestic refiners. *See generally* Doc. No. 190, Vol. I. While the increase in crude oil costs can readily be calculated, it is impossible to trace these increased costs through an individual refiner's refining, distribution and marketing operations. In fact, no party sought to establish such a tracing in the context of this proceeding, or suggested a valid tracing methodology based on inspection of an individual refiner. Even if it could be done, a precise tracing of those costs through an individual refiner's operations would not be probative of the question before us. That is true because through the mechanism of the Entitlements Program, the MDL 378 overcharges

caused a small increase in the cost of each barrel of crude oil refined in the United States. Since the market price for refined products is related to the cost of crude oil, the general level of refined product prices rose when the cost of crude oil increased as a result of crude oil miscertifications. *Id.* Attempts to trace increased costs caused by crude oil overcharges through a particular refiner's refining, distribution and marketing operations ignore the resulting increase in market prices for refined products, and would therefore not provide an indication of the refiner's ability to pass through the increased costs as market prices for products rose.

Instead, the evidentiary record in this case addressed a different issue. The record compiled before the OHA indicates that by using marginal economic analysis, and focusing on the industry as a whole, it is possible to estimate indirectly the amount of crude oil price increases caused by the MDL 378 overcharges that were absorbed by refiners as a class, and the amount which they passed through to downstream purchasers in the form of higher product prices. The central issue thus became how to estimate the amount by which product prices rose as a result of refiners' ability to pass through the general crude oil cost increase caused by the MDL 378 overcharges.

To address this issue, the parties made numerous attempts to estimate the precise effect the MDL 378 overcharges, as transformed into a general crude oil increase by the Entitlements Program, had upon the prices charged by refiners for refined petroleum products. The evidence in the record indicates that the Entitlements Program dispersed the overcharges *equally* to each barrel of crude oil, so that in a given month each refiner or participant initially bore that part of the overcharges which was proportional to its pro rata share of total crude oil runs to stills covered by the Entitlements Program in that month. The expert witnesses generally agreed that this per barrel decline in the entitlement subsidy was, in

effect, a uniform crude oil cost increase to all participants. *See, e.g.*, Doc. No. 190, vol. 1, at 54-59; Doc. No. 197, at 2. It was also generally agreed that the crude oil cost increases caused by the MDL 378 overcharges were indistinguishable in effect from any other crude oil cost increases. *Id.*

For certain Entitlements Program participants such as public utilities, agricultural cooperatives, and municipalities, the inquiry ends there. As explained below, these entities received entitlement benefits and appeared on the monthly notices published by the Department, even though they were not commercial refiners. Because of the manner in which those entities operate, the impact of the MDL 378 overcharges was completely passed through to their customers. Those entities therefore were not injured at all by the MDL 378 overcharges. The impact on the customers, or in the case of municipalities, the local citizens, of each of these entities is easy to calculate — it is equal to the full amount by which their entitlement benefits decreased in each month when the overcharges occurred. Whether these entities should be deemed to "stand in the shoes" of their customers is not discussed in this report. Precisely the same calculation of injury can be made for certain other directly affected end-users, such as those who purchased petroleum products pursuant to contracts with refiners which tied prices to the post-entitlement cost of crude oil. As in the case of the Entitlements Program participants outlined above, pass-through questions are not relevant, and the impact of the MDL 378 overcharges on each member of this group of end-users can be calculated — it is equal to the full amount by which the prices it paid to a refiner under "entitlements-linked" contracts increased each month as the refiner's entitlements benefits were reduced by the MDL 378 overcharges.

Public utilities participated in the Entitlements Program in several ways. First, certain imports of residual fuel by utilities made them eligible to participate in the

Entitlements Program. Under regulatory amendments adopted on April 1, 1976, certain importers of residual fuel oil were deemed to be "eligible firms" under the Entitlements Program and earned a percentage of the value of an entitlement for each barrel of residual fuel imported into a specified market. *See* 10 C.F.R. § 211.67(a)(3). Between April 1, 1976 and June 30, 1978, only importers of residual fuel into the East Coast market of the United States were eligible to participate in the Entitlements Program. Beginning on July 1, 1978, firms that imported residual fuel oil into the State of Michigan were added to the list of eligible firms. *See* 43 Fed. Reg. 49,682 (1978); 44 Fed. Reg. 34,468 (1979). The record in this proceeding indicates that the New England Electric System imported residual fuel and participated in the Entitlements Program in this fashion. New England Electric System supplies electricity to over one million customers in New England. Doc. No. 10. The system sells electricity at wholesale and supplies all of the electric energy needs for Granite State Electric Company in New Hampshire, Masachusetts Electric Company, and the Narragansett Electric Company in Rhode Island. *Id.* According to its submission, the primary fuel utilized by the New England Electric System is No. 6 residual fuel. *Id.* Other utilities as well participated in this aspect of the Entitlements Program, including Consumers Power Company. *See* Doc. No. 28; *see also Consumers Power Co.*, 6 DOE ¶ 81,251 (1980).

In addition to its participation in the Entitlements Program as an eligible residual fuel importer, Consumers Power Company, another party to this proceeding, has participated as a "refiner." Consumers Power Company serves approximately two million customers in the lower peninsula of Michigan. Doc. No. 28. During some of the months when the MDL 378 overcharges occurred, it operated a synthetic natural gas plant in Marysville, Michigan. *Id.* That plant was considered to be a "refinery" for purposes of the Entitlements Program, and the firm

a "refiner." Since the firm did not resell refined products, but only used the "crude oil" feedstocks which it purchased for making synthetic natural gas, it passed through all of the overcharges to its customers. According to the firm, mechanisms are in place pursuant to order of the Michigan Public Service Commission to assure that any refund obtained will be refunded directly to its natural gas customers through rate reductions. *Id.* Mr. Jack Timmerman, Senior Supervisory Accountant for Consumers Power Company, testified that any refund obtained in this proceeding would be passed through to these customers either by a line item credit on a bill or by check issued to the refund recipient. Tr. at 2028-29, 2032.

The possibility exists, however, that the present customers of public utilities were not in fact injured. If the MDL 378 overcharges had not occurred, the entitlements subsidy would have been greater. This would have led to a decrease in world market prices for residual fuel oil. This in turn would result in an increase in demand, a different competitive market, and a change in the consumption of residual fuel worldwide. None of these issues were addressed by the parties during the course of this proceeding. In addition, the current customers of a utility and the customers of that utility during the period in which the MDL 378 overcharges occurred are not necessarily identical. It is therefore possible that current customers of utilities such as Consumers Power were not injured by the MDL 378 overcharges.

Agricultural cooperatives that owned crude oil refineries comprise another group of Entitlements Program participants of which the impact of the MDL 378 overcharges on each firm can be calculated. According to the National Council of Farmer Cooperatives, refineries owned by cooperatives processed approximately 2.5 percent of all crude oil inputs in the United States during 1979. Doc. No. 187, Exh. No. 1, at 5, Table 3. For example, Midland Cooperatives, Inc. operated a refinery from Nov-

refinery) with a rated capacity of 19,600 barrels per day. Doc. No. 202, at 1-2. To the extent Midland sold petroleum products to its member-owners, they experienced the impact of the MDL 378 overcharges. Midland states that if it receives a refund "it would be passed downstream to the member-owners proportionately based on the quantity of petroleum products they purchased from Midland." *Id.* at 6.

The impact of the MDL 378 overcharges on each member of another group of Entitlements Program participants can also be precisely calculated. That group comprises those firms and municipalities that participated in the program as producers, marketers, or consumers of petroleum substitutes. In May 1978, the Department of Energy promulgated rules which permitted the producer, marketer, or consumer of a petroleum substitute to participate in the Entitlements Program. 10 C.F.R. § 211.67(a)(5). The regulations provided for automatic inclusion in the Entitlements Program of ethyl alcohol derived from biomass when mixed with gasoline for use as motor fuel, solid municipal waste and solid waste derivatives used as fuel, shale oil used in a refinery or for non-refining purposes, and methane derived from municipal sewage or landfills. The regulations also provided on a case-by-case basis for inclusion in the Entitlements Program of solid fuels derived from non-municipal solid waste, as well as gaseous fuels derived from biomass, coal, and tar sands. *See generally Hilo Coast Processing Co.*, 10 DOE ¶ 81,018 (1983). Each eligible firm was permitted to report one barrel of crude oil run to stills for each volume of the petroleum substitute produced having a gross heating value equal to a barrel of crude oil. Therefore, for each such reported volume a reporting firm received benefits under the Entitlements Program equal to the benefits that a barrel of crude oil received when processed by a refiner. Among the firms that received entitlements benefits for petroleum substitutes were producers of ethanol for use as a blendstock for gasohol and municipalities that generated fuel from

solid waste, sewage or landfill. The injury to each of these participants in the Entitlements Program can be calculated by reference to the amount the monthly entitlements subsidy was decreased by the MDL 378 overcharges.

Other large consumers of petroleum products experienced the full impact of the decrease in the entitlement subsidy caused by the MDL 378 overcharges. For example, a number of end-users purchased petroleum products pursuant to contracts which tied prices to the post-entitlement cost of crude oil. Southern California Edison Company states that it purchased about 330 million barrels of fuel oil for use in its electric generating plants from August 1973 through January 1981. Doc. No. 219, at 3. According to the firm, "Edison's fuel oil contracts provided for the direct flow through of the impact of entitlements from the refiner to Edison." *Id.* at 3-4. The impact on Southern California Edison's customers can be readily calculated — it is equal to the amount by which the prices paid to refiners under "entitlements-linked" contracts increased each month as the refiners' entitlements benefits were reduced by the MDL 378 overcharges. As a corollary, it is clear that refiners who sold products under this type of contract experienced *no* injury with respect to the crude oil used to refine these products since all of the impact of the MDL 378 overcharges was passed on to their customers.

The groups of Entitlements Program participants set forth above comprise a small minority of all participants. For the primary group initially affected by the overcharges — commercial refiners as a class — it is not easy to calculate the impact of the MDL 378 overcharges. As stated previously in this report, the Entitlements Program transformed most of the MDL 378 overcharges into a small, uniform crude oil cost increase incurred by all domestic refiners. There was general agreement among the economists who testified at the hearings that this cost increase caused the general level of refined product prices to rise. The next question to consider, therefore, is the

extent to which the market price for the refined products produced by these refiners was sensitive to a general increase in crude oil costs. If the market price for refined products rose in an amount equal to or greater than the relatively small increases in crude oil costs involved in this proceeding, the refining industry recouped all of those increases from their customers. Conversely, refined product prices could have risen by only a percentage of the crude oil cost increase. If one could understand and define the relationship between a general increase in crude oil costs and refined product prices, then it would be possible to determine the extent to which refiners as a class bore the impact of the crude oil overcharges.

Except for one refiner, no party contended that something other than the industry-wide situation should be examined to determine whether the market prices *it* received for its products were sensitive to the crude oil cost increases *it* experienced as a result of the MDL 378 overcharges. Virtually all parties agreed that this question could only be approached by analyzing industry-wide data. To determine the extent to which a *particular* refiner passed through the impact of the MDL 378 overcharges, one must look at and analyze a number of factors specific to the operations of that refiner. Among those factors are (i) the competitive environment faced by the firm in its specific market, (ii) the extent to which long-term contracts prevented or allowed the refiner to pass through increased crude oil costs, (iii) the extent to which the product slate refined by the particular firm prevented or allowed the firm to pass through costs. We know of no methodology that would readily enable a fact-finder to analyze these factors, and no party in this proceeding has suggested such a methodology. The evidence in the record submitted by the parties therefore does not permit findings of fact to be made with regard to specific refiners.

Commonwealth Oil Refining Company, Inc. (Corco), a refiner located in Puerto Rico, urged the OHA to look

beyond the general, industry-wide situation and consider separately the impact of the crude oil cost increases caused by the MDL 378 overcharges on so-called "marginal" refiners as a group. Doc. No. 186. Evidence was offered on behalf of Corco by Dr. Edward W. Erickson, a professor of economics and business at North Carolina State University. He testified that the so-called "marginal" refiner was injured in a way materially different from the average refiner. Tr. at 2142-78. We have concluded that Corco has failed to show that the financial position of a particular refiner is probative of the issue concerning the impact of the MDL 378 overcharges on domestic refiners as a class. The amount of the overcharges that the Entitlements Program spread to Corco on a per barrel basis was exactly the same as for any other domestic refiner. The ability of so-called "marginal" refiners to pass through that amount was based upon the same factors that other domestic refiners faced, since they sold refined petroleum products into the same domestic market. Thus, the financial circumstances of allegedly "marginal" refiners such as Corco have not been shown to be helpful to this inquiry.

The next sections of this report discuss the various methodologies other than marginal economic analysis that have been advanced in this and other proceedings for measuring the impact of crude oil overcharges on refiners. After that discussion, the report will concentrate on the industry-wide marginal economic analyses that were the primary focus of the evidentiary hearings.

i. Cost Banks

Under the DOE price regulations, a refiner could not charge a price higher than its maximum allowable price calculated by reference to the refiner price rule contained in 10 C.F.R. § 212.83. However, a refiner was free to charge any price below that level. If a refiner did in fact charge a price below its maximum allowable price, it was permitted to "bank" the difference and, subject to certain

restrictions, apply those banked costs to increase its maximum allowable prices in future months.

A number of refiners in this proceeding have argued that the fact that they accumulated sizeable banks of unrecouped costs calculated pursuant to the refiner price rule is conclusive evidence that they did not pass through the increased crude oil costs caused by the MDL 378 overcharges. *See* Doc. Nos. 182, 185, 195. For example, Sun Company, Inc. advocated a so-called "regulatory methodology," by which a refiner would receive a refund if it did not exceed its maximum allowable price levels for refined products during a particular month and had banks during that month that were in excess of the refund claimed. Doc. No. 200. Sun's witness conceded that the firm always had banks of sufficient size to receive the maximum refund possible — a proportion of the total overcharges equal to its entire share of the overcharges distributed by the Entitlements Program. Tr. at 1879-80. In other words, under the Sun methodology refiners who had cost banks (and most refiners did have large banks) would receive most of the restitution funds at stake in this proceeding. The ensuing discussion of cost banks addresses the Sun "regulatory methodology" and the similar theories advanced by Tenneco Oil Company in Doc. No. 195, and by Shell Oil Company in Doc. No. 182.

For the reasons discussed below, we find that cost banks alone cannot be used to determine the extent to which refiners were injured by the MDL 378 overcharges. However, they do have evidentiary value in this proceeding; indeed, cost banks are significant in two respects. First, they do form a part of our overall impression of the relationship which we are examining. Second, it is uncontested that the *absence* of cost banks would mean that an individual refiner was *not* injured because it indicates a complete passthrough of all cost increases since May 15, 1973, including the impact of the MDL 378 overcharges. *See generally* Document No. 190, Vol. 1, at 48 ("the economic meaning of banked costs").

As a direct measure of injury, however, cost banks are of no use. In a number of previous determinations issued in special refund proceedings conducted pursuant to 10 C.F.R. Part 205, Subpart V, we have discussed whether the existence of cost banks alone is a sufficient factual showing to demonstrate that a firm absorbed increased costs. For example, in *Aluminum Company of America/Tenneco Oil Co.*, 11 DOE ¶ 85,254 (1984), it was stated:

> The existence of cost banks does not prove that Tenneco was injured by purchasing NGLPs from Alcoa. We have consistently rejected the position that the existence of cost banks alone is an adequate demonstration of injury. In *Palo Pinto,* we stated:
>
> > Although the absence of sufficient banks of unrecouped cost increases indicates that a firm was able to pass through increased product costs to its customers, the opposite conclusion cannot be drawn. The existence of sizeable banks, in and of itself, indicates only that a firm was unable to pass through or chose not to pass through a portion of its allowable costs calculated under the refiner price regulations. *See generally* 10 C.F.R. § 212.83. Accordingly, the fact that Gulf maintained such banks does not demonstrate that Gulf actually absorbed Palo Pinto's alleged overcharges.
>
> 10 DOE ¶ 85,049 at 88,240-41 (1983) (footnote omitted).

There is ample support for the conclusion that cost bank data is insufficient to show that a refiner did not pass through the increased costs associated with particular alleged overcharges. It is important to underscore the fact that cost banks were strictly a creature of the DOE regulatory program. *See Office of Special Counsel for Compliance,* 10 DOE ¶ 85,048 (1982) (hereinafter cited as *Amoco*). They do not

represent simply an aggregation of unrecovered product cost increases. As we explained in *Palo Pinto,* because of the structure of the refiner price rules, many factors affected the size of cost banks in a more pronounced manner than a particular overcharge. For example, changes in inventories of crude oil and refined petroleum products had a *major* impact under the DOE regulations on the amount of "unrecovered" product costs that could be banked. When crude oil inventories increased or sales of products declined, banks tended to increase. When crude oil acquisition costs increased and refined product sales declined, refiners' banks of unrecovered product costs increased dramatically.

Other factors contributed to the existence of large cost banks calculated pursuant to the refiner price rule. These factors include the use of incentives in the refiner price rules, such as the provisions to encourage refinery modernization and the "gasoline tilt" rule, and the occurrence of fortuitous transactions on the base date selected for calculating allowable prices under the DOE regulations. In addition, as the Temporary Emergency Court of Appeals has noted, a shift of customers between classes of purchaser may also have a substantial impact on the size of a firm's banks, particularly where that firm may have erroneously overstated the base price for some classes of purchaser. *See Pacific Service Stations v. Mobil Oil Corp.,* 689 F.2d 1055, 1065 (Temp. Emer. Ct. App. 1982).

Moreover, a bank of unrecovered costs cannot be directly translated into a loss of profit with respect to any particular transaction. A bank of costs is an aggregate figure accumulated from many transactions. As a result, it is not possible to relate any particular part of Tenneco's unrecovered costs to its purchases from Alcoa. A firm such as Tenneco buys and sells large quantities of NGLPs and deals with

> numerous buyers and sellers. Product purchased from one seller becomes part of Tenneco's firmwide supply. When products purchased from many sources are commingled, they become fungible, and individual purchases lose their identities for purposes of tracing costs. In other words, Tenneco could have been recovering fully every dollar of increased costs attributable to its purchases of NGLPs from Alcoa and the unrecovered costs in Tenneco's banks could have been attributable entirely to other sources (e.g., increases crude oil purchasing costs). This situation could have occurred *at the same time* as Tenneco's banks were increasing. As noted above, Tenneco's operations are extensive, and Tenneco's cost banks therefore fluctuated in response to increased or decreased costs associated with a variety of products and suppliers. Thus, it is conceivable that the alleged Alcoa overcharges may have been fully recovered, even while total cost bank levels were increasing due to completely independent transactions.

11 DOE at 88,442-43.

In another OHA refund proceeding which involved facts similar to those in the *Alcoa/Tenneco* case quoted above, the Atlantic Richfield Company (Arco) argued that cost banks alone were sufficient evidence of injury on which to base a refund. *National Helium Corp./Farmland Industries, Inc.*, 11 DOE ¶ 85,257 (1984). Arco's cost bank argument was rejected for the same reasons. *Id.* at 88,463-66. It is interesting to note that Arco has retreated from that position in the present litigation. Instead, Arco's principal witness, Dr. Joseph P. Kalt, devoted 20 pages in his written direct testimony to a discussion of the "economic meaning of banked costs" and concluded that the existence of cost banks signifies only that refined product prices were governed by market conditions of supply and demand rather than by price controls. Document No. 190, Volume 1, at 51. Indeed, Dr. Kalt contends that the existence of sizeable refiner cost banks makes it appropri-

ate to use classic "incidence analysis" to accurately assess the absorption of crude oil overcharges by refiners. *Id.* Incidence analysis is discussed in greater detail subsequently in this report.

It is for these same fundamental reasons that the United States District Court for the District of Columbia recently held that cost bank data in and of itself was insufficient to demonstrate injury. *Denny Klepper Oil Company v. DOE,* 598 F. Supp. 522 (D.D.C. 1984). In a carefully reasoned opinion, after characterizing cost banks as an accounting device, *id.* at 525 n.5, Senior Judge Gerhard A. Gesell stated that:

> it is clear that the existence of banks is necessary but not sufficient to a showing that there was no pass-through. The absence of banks would indicate that a company passed on all of its increased costs to its customers. But the presence of banks indicates only that a company absorbed some, but not necessarily all, of the cost increases it experienced. Moreover, because cost increases could be mixtures of legal and illegal price hikes, a company could show steadily increasing banks from its absorption of the legal cost increases while at the same time the illegal increases were being passed on to customers.

Id. at 527-28. Nothing developed in the hearings held in this proceeding has affected the conclusions reached in the cases cited above.

In this proceeding, the states added a new argument addressed to cost banks, and urged that cost banks should be used as a "cap" — an upper limit — on the level of refunds that refiners would otherwise be eligible to receive. Doc. No. 198, at 6, Tr. at 2369. They argue initially that the level of cost banks reported by refiners is unreliable. Doc. No. 198, at 4-6. They also contend that cost banks include unrecouped costs incurred for expenditures other than crude oil. Doc. No. 198, at 5. But regardless of the extent to which cost banks reported by

refiners may be inflated, the states argue that they reflect a *maximum* percentage of total input costs which refiners did not pass through. Using publicly available data reported for the domestic refining industry, the states conclude that the ratio of banks to the total amount of increased costs from all sources during the period of federal price controls indicates that refiners were able to pass through all but a very small portion of increased crude oil costs. Doc. No. 198.

A specific method for applying the cost bank cap urged by the states was suggested in the direct testimony of Dr. Howard Pifer. Under that method, refiners as a group would be limited to a refund based upon the ratio of the total amount of banks to the total amount of increased costs from all sources during the same period. Doc. No. 198.

For the same reasons discussed in rejecting the refiners' arguments above, we find that cost banks should not be used as a cap on refunds. They are not an effective tool in this proceeding for accurately measuring the extent to which refiners absorbed the impact of the MDL 378 overcharges.

ii. Per Barrel Profits of Refiners

In the December 12, 1983 notice issued in this proceeding, the OHA noted the suggestion that an analysis of industry-wide per barrel profits reported by refiners might be useful in attempting to measure the extent to which refiners as a class were able to increase their sales prices to recover increased crude oil costs (including MDL 378 overcharges). It seemed logical that if refiners were required to absorb substantial crude oil cost increases, over time their per barrel profits in dollar terms would fall. As indicated in the December 12, 1983 notice, parties had submitted data in another OHA crude oil refund proceeding which showed that the opposite in fact appeared to have occurred. According to that submission, the per barrel profits reported by domestic refiners dur-

ing the period of the MDL 378 overcharges rose steadily from 1974 through 1978, showed a sharp increase in 1979, and then fell slightly toward the end of the regulatory program in 1980-81. 48 Fed. Reg. 57,608 at 57,611 (1983).

A number of submissions and witnesses discussed whether evidence of industry-wide per barrel profits was relevant to the inquiry before us. No one suggested that an analysis of per barrel profits for each domestic refiner would be useful to determine the extent to which the particular refiner absorbed the impact of the MDL 378 overcharges. In general, witnesses presented by refiners argued that evidence of industry-wide per barrel profits is not probative of whether refiners as a class absorbed the impact of the MDL 378 overcharges. *See, e.g.*, Tr. at 543-45, 1923. They pointed out a number of alleged flaws in the data. In addition, Dr. Kalt questioned the probative value of the profit data for our inquiry because the data was not adjusted to hold constant factors other than crude oil costs. Tr. at 544. Mr. George Butkovich, a witness on behalf of Ashland Oil, agreed with Dr. Kalt that this type of analysis did not isolate the effect of crude oil price increases on product prices. Tr. at 1923 et seq. He also claimed that the data which the states had drawn from a DOE study of refiners' profits could not form the basis for any reasonable conclusions about the refining industry as a whole, because it was taken from an unrepresentative sample of only nine major firms. Tr. at 1927. On the other hand, witnesses offered by the states took the position that this material was useful in our deliberations. They argued that regardless of alleged problems with the refiners' profit data, it was yet another indication of the fact that refiners as a class were generally able to pass through cost increases. Tr. at 2381-85, 2501-08, 2544-52, 3471-75.

After reviewing the evidence, we agree with the witnesses who stated that an analysis of refiners' reported per-barrel profits does not sufficiently isolate effects of marginal increases in crude oil costs. Tr. at 543-45, 1923.

However, we also agree with the states that changes in refiners' per-barrel profits do indicate a general ability of the domestic refining industry to pass through rising costs by increasing product prices during the period of the MDL 378 overcharges. Like the cost bank cap theory advanced by the states, this evidence does not form a basis for accurately determining the extent to which refiners as a class absorbed the impact of marginal crude oil cost increases. Nevertheless, it does form a part of the "big picture" and is useful in that sense for testing the reasonableness of the conclusions suggested by the more sophisticated types of economic evidence discussed below.

iii. Economic Analysis

As noted above, the record compiled in this proceeding has focused on the domestic refining industry as a whole and has not attempted to trace the impact of the MDL 378 overcharges through the operations of individual refiners. The most useful method for measuring the impact of the MDL 378 overcharges on the refining industry presented in the record is marginal economic analysis. In fact, most of the evidence submitted in this proceeding has concerned marginal economic analysis. Expert witnesses for parties representing refiners, large end-users (such as public utilities), and state governments have all submitted marginal economic models with statistical verification and validation. These submissions were based on different and often conflicting theories about the nature of the domestic petroleum industry. *Compare* Doc. No. 190 *with* Doc. No. 196. The ensuing discussion of this economic evidence is not intended to be a comprehensive review of the entire record; instead, it focuses on the evidence which we found to be most relevant to the disputed factual issues.

Marginal analysis attempts to estimate the impact on an economic system, like the domestic refining industry, which results from changing one variable included in an economic "model" of that system, such as the cost of crude oil. It attempts to hold other factors constant, and

thereby to isolate the marginal effect of a change in that variable. It has been called a "but for" or "what if" analysis, Tr. at 2802-04, and may be concerned with forecasting the effect of a future event, or isolating the effect of a past event. Tr. at 3152-55. In this case, marginal economic analysis permits us to ask what the price of refined products charged by domestic refiners as a group would have been had the MDL 378 overcharges not occurred. Tr. at 508-13. The expert witnesses in this case attempted to answer that question by estimating how much of the crude oil cost increases involved were passed through to the marketplace in the form of refined product price increases by the domestic refining industry as a whole. Because the econometric techniques which were used to answer that question yield only approximations, one cannot have 100 percent confidence in their results, just as one cannot predict the future. The difficulty in performing this type of analysis is that economic events almost never happen in isolation; in the real world, they are generally affected by many different factors. For example, the record in this proceeding indicates that prices for refined products are influenced by many factors, some of which are simply not susceptible to quantification. As a result, it is impossible to isolate with 100 percent accuracy the effect a change in one factor, such as a crude oil price increase, had or will have on a dependent variable, such as the price of motor gasoline. Nevertheless, due to the overriding importance of these issues, economists have studied them at length, and much of this experience was reflected in the record developed during the course of these proceedings.

In this paragraph we explain some of the terms which will be used in the ensuing discussion. The term "econometrics" describes the application of statistical tools to the study of economics and includes both the process of economic modeling and the testing of various hypotheses using statistical methods. Tr. at 2801. The DOE's Energy Information Administration regularly engages in this type of activity for the purpose of projecting

energy needs and availability. 42 U.S.C. §§ 7135(a)(2) and 7135(d). One of the statistical methods commonly used by econometricians to estimate the marginal impact of an enonomic event is regression analysis. A simple regression analysis can be used to estimate statistically how the "dependent" variable in an economic model is related to, or affected by, the "independent" variable. Tr. at 3150. One might be able to predict the dependent variable more accurately if more than one independent variable is used in the model. In that event, the regression is called a multiple regression. It uses two or more independent variables. Multiple regression can be used to estimate the unknown value of the dependent variable on the basis of the known or hypothesized values of other variables. This type of analysis has been used before in judicial and administrative forums. *See, e.g.,* Fisher, *Multiple Regression in Legal Proceedings*, 80 Colum. L. Rev. 702 (1980); Finkelstein, *The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases*, 80 Colum. L. Rev. 737 (1980); Finkelstein, *Regression Models in Administrative Proceedings*, 86 Harv. L. Rev. 1442 (1973).

In this proceeding, we are attempting to measure the relationship between one independent variable and the dependent variable, not to predict the future value of the dependent variable. There was considerable dispute among the experts about the proper economic model and regression techniques to be used to isolate the causal relationship between crude oil overcharges and the rise in refined product prices during the period when the MDL 378 overcharges occurred. It was generally accepted by the expert witnesses, however, that if the relationship between increased marginal crude oil cost increases and increases in refined product prices could be accurately estimated, it would be possible to know what portion of the impact of a general crude oil overcharge was absorbed by the domestic refining industry. That is why this aspect of the evidence occupied so much time and attention during the hearings. It is important to remember that the

analyses introduced by the parties do not focus on particular firms. Rather, they attempt to estimate the general effect a crude oil price increase had upon industry-wide refined petroleum prices. This report is based on the record compiled before the OHA and does not address the question of whether this type of analysis satisfies the court's mandate to the OHA that it conduct fact-finding concerning the particularized tracing and impact of the overcharges.

The record reflects vigorous debate among the experts about the independent variables other than crude oil costs that should be included in a regression analysis to accurately depict the domestic refining industry during the period of the MDL 378 overcharges, the correct measurement of elasticities of supply and demand, and the proper statistical techniques to be applied. Each of these disputes is discussed in detail in the following portion of this report.

A number of statistical issues were considered by the expert witnesses and the hearing panel as the reliability of refiner cost absorption estimates of the various regression models was debated. The first of these issues is the presence in many multiple regressions of "multicollinearity," a situation in which two or more of the independent variables are correlated. The effect in this situation, in terms of statistical confidence, is that it is impossible to estimate specific effects of one independent variable because the data does not necessarily provide information concerning the effect of one independent variable, holding the other independent variable constant. In other words, we are not sure that we are able to tell how much effect each independent variable has separately — all we can be certain of is the effect of both combined.

The second statistical issue hotly debated at the hearings concerns the significance of "serial correlation" in the "error terms" of the regression equations. The error terms in a regression equation account for variance be-

tween the actual and the predicted value of the dependent variable. Serial correlation in a time series is diagnosed by an index called the Durbin-Watson statistic. We will consider the significance of this and other statistical "diagnostics" later in this section.

Marginal economic analysis requires several distinct steps. Tr. at 3308. First, it is necessary to construct an economic model that is probative of the question with which we are concerned. This model would describe the relationship between the variables in which we are interested. Second, we need to apply statistical methods — such as multiple regression and correlation analysis techniques — to estimate the effect of changes in the variable or variables under study. In other words, in this case we would examine the effects of crude oil cost increases on refined product price fluctuations.

The analytical process does not end there, however. For example, two variables may exhibit an apparent statistical relationship yet be unrelated in fact. It is important, therefore, to evaluate the relationships obtained through the use of econometric techniques from a "common sense" perspective based on knowledge of the subject under analysis. In this regard the testimony of Dr. John Wilder Tukey was most instructive. Dr. Tukey is a professor of statistics and Donner Professor of Science at Princeton University. He is also a world-renowned authority in statistics, and serves as Associate Executive Director of the Research-Information Sciences Division of AT&T Bell Laboratories. Dr. Tukey's professional credentials in the record and his demeanor on the witness stand indicate that he is clearly the "expert's expert" in statistics. Tr. at 3145-49. In that role, his testimony revealed some subtleties that were missing from the testimony of other witnesses. Dr. Tukey's testimony repeatedly emphasized that the statistical estimates generated by a multiple regression analysis do not necessarily answer all questions regarding the underlying model. *See, e.g.*, Tr. at 3150-52, 3155-56, 3157, 3167, 3178, 3219-20. Dr. Tukey testified

that a researcher should be concerned that the model being used answers the question posed in an efficient and effective manner. Tr. at 3156-57.

This principle appears to be misunderstood by a number of other witnesses. They suggested that formal statistical diagnostics are *the* key element in judging the various competing theories. For example, much of the hearings was taken up with a discussion of a phenomenon called "serial correlation," which is briefly described above. This subject arose during the cross-examination of Dr. Peter D. Linneman, a witness for Philadelphia Electric Company, who submitted a regression analysis of the relationship between crude oil prices (the independent variable) and refined product prices (the dependent variable). Dr. Linneman's analysis seemed to indicate that refiners passed through more than 100 percent of their crude oil cost increases during most of the period covered by the MDL 378 overcharges. The low Durbin-Watson statistic for the original Linneman regressions indicated the presence of serial correlation. As a result, refiner witnesses questioned the validity of any conclusion based on the Linneman regressions in their original form. Dr. Daniel Rubinfeld, an econometrician presented by Arco et al., stated "that if we think we've got the right model, it's very important to correct for serial correlation." Tr. at 2837. In effect, these refiner witnesses asserted that the OHA was *forced* by the serial correlation factor alone to reject certain models and results, and instead select the models and results they advocated.

Dr. Tukey's views were markedly different. The question posed to Dr. Tukey by counsel for the Arco refiners spoke about the "problem" of serial correlation and asked the consequences for a statistical analysis if the data is "infected" with serial correlation. Tr. at 3162. Dr. Tukey's response did not describe the existence of serial correlation as an infection or a problem at all. *See* Tr. at 3162-68. He testified about what the existence of serial correlation means with respect to the underlying model and the need

to understand why serial correlation appears. He testified further that "if you don't understand why this [serial correlation] appears, you are, from my point of view, left uncomfortable about both the uncorrected and the corrected [version of the model]." Tr. at 3170. According to Dr. Tukey, an economic model may or may not be properly specified to answer a particular question, but "[t]he question which of the possibilities is correct cannot be answered by the numbers alone." Tr. at 3219.

Dr. Tukey's advice has served as a lodestar for our analysis of the conflicting statistical evidence in this case. As noted throughout this report, the evidence in the record does not attempt to trace the precise impact of the MDL 378 overcharges on individual refiners. Instead, the evidence in the record addresses the extent to which refiners as a class bore the impact of the overcharges. In the words of Dr. Tukey, one does not answer that fundamental question "by the numbers alone." Statistical diagnostics do not in and of themselves form the basis for an informed conclusion on the type of economic questions involved in this case. Instead, they must be addressed by placing *all* of the different pieces of evidence in proper perspective. In referring the case to the OHA, the district court hardly thought that important issues should be answered solely by a poll of statisticians or economists. Instead, it believed that OHA's knowledge of and experience in the world under analysis — the domestic refining industry as regulated during the period of the MDL 378 overcharges — would be required to judge the evidence. *See* Referral Decision at 596.

During the course of the proceeding, we received much advice about how to achieve the proper perspective from which to decide among the competing theories propounded by the parties. The testimony of Dr. William W. Hogan, Director of the Energy and Environmental Policy Center at the John F. Kennedy School of Government at Harvard University, was especially helpful for guidance in how to reconcile the conflicts among the different

models and theories. Dr. Hogan, an expert in economic modeling, testified instructively about the approach which should be taken in analyzing the evidence. He stated that he customarily taught his students to begin the process with a "back of the envelope" analysis to try and define the approximate scale of an issue. Dr. Hogan advised that one should begin with a simple intuitive approach to a problem, and make the model more complicated only as needed in order better to understand what was happening in the market under analysis. Tr. at 3423. He also stated that "it was very important to get the economic theory correct first, and then to apply the correct statistical methods in order [to] estimate the coefficients or the parameters from that economic theory. . . ." Tr. at 3308-09. Dr. Hogan further testified that his experience indicated "the importance of using many different models to address the same question as a way of trying to get some insight and understanding of what was happening in energy markets." Tr. at 3309. According to Dr. Hogan, those other models or approaches should be used to increase or decrease the confidence of the estimates that are obtained from econometric analysis. Tr. at 3369. The teaching of Drs. Tukey and Hogan is that we apply our knowledge, experience, and common sense in evaluating the different theories, the data used, the statistical techniques employed the statistical estimates obtained, and the positions advocated by the parties.

a. Economic Evidence Presented by Refiners

A group of ten major refiners — denominated Arco et al. during the course of this proceeding — participated extensively throughout the proceeding. It submitted a detailed economic study regarding the impact of these oil overcharges, authored by Dr. Joseph P. Kalt, an associate professor of economics at Harvard University. In that study, Dr. Kalt concluded that refiners as a class absorbed 30.5 percent of the MDL 378 overcharges passed on by direct purchasers to participants in the Entitlements Program. Dr. Kalt's written testimony was over

250 pages long and was based largely upon two of his published books and his doctoral dissertation. Dr. Kalt was a confident and knowledgeable witness, and his written submissions were quite ingenious and reflected a great deal of effort. In fact, as can be seen below, his analysis laid basic groundwork and served as the starting point for the debate which took place. The discussion below will focus on the strong points as well as the limitations in his work; in its course this discussion will set the stage for what we conclude is the best way to view the relevant economic issues and for our finding as to the level of absorption actually experienced by the domestic refining industry.

Underlying Dr. Kalt's work is a method of economic analysis known as "tax incidence analysis." Incidence analysis is a well-known and accepted method of estimating the effect of a tax on a specific product by determining how much of the added cost represented by the tax is absorbed by firms which supply the product, and how much is passed on in the form of higher prices to consumers who demand the product. In general terms, incidence analysis states that the amount of a cost increase absorbed by a firm depends upon the price elasticities of supply and demand of outputs. These can be described as E_s and E_d in symbolic terms, and represent the changes in quantities of a specific product demanded by consumers, or supplied by producers, which occur in response to a given change in the cost of the product. In graphic terms, when costs increase, a shift in the supply curve occurs due to the higher costs, and the supply curve then intersects the demand curve at a different point. E_s and E_d measure the slopes of the supply and demand curves, respectively. According to the theory, absorption ("A") of a cost increase by a firm equals the elasticity of demand divided by the sum of the elasticity of demand and the elasticity of supply. This can be expressed as the formula:

$$A = \frac{E_d}{E_s + E_d}$$

During the evidentiary hearing, some parties questioned whether the assumptions underlying incidence anaylsis were met in this case. Tr. at 119, 1365-67. However, most parties accepted this method of analysis, and the appropriateness of incidence analysis as a valid method for approaching the question at hand was never credibly challenged in this proceeding. *See, e.g.*, Tr. at 362-63.

Incidence analysis can be used to estimate the extent of absorption of a particular cost increase (such as a crude oil overcharge) if the elasticities of supply and demand of refined products were accurately known. Although the incidence formula is appealingly simple, ascertaining those elasticities is a difficult task. Since there is no method that will measure them directly, a method must be devised to measure these elasticities indirectly — i.e. by looking at something that can be measured.

In his testimony, Dr. Kalt tried to estimate both the elasticity of demand and the elasticity of supply for refined products. He began by examining several studies of the elasticity of demand for petroleum products. His review of the literature concluded that crude oil refiners faced a demand elasticity of 0.156 for motor gasoline. Tr. at 4084-87. Dr. Kalt's demand elasticity estimates for motor gasoline and other refined petroleum products were disputed, notably by Dr. Howard Pifer, who criticized the manner in which he selected certain studies for his estimates and excluded others. Nevertheless, Dr. Kalt's demand elasticity estimates are reasonable, and they are based on a substantial review of studies in the economic literature. In addition, the results of those studies fall into a fairly narrow range.

Returning to the absorption formula set forth above, Dr. Kalt then needed to obtain the elasticity of supply for refined petroleum products. Since there is no generally accepted technique used by economists to measure the elasticity of supply of refined products directly, Dr. Kalt devised a way to estimate the elasticity of supply. Dr.

Kalt first solved the incidence analysis formula for one product, motor gasoline. To do this, he used the elasticity of demand figure (the "E_d" term) for motor gasoline which he estimated from a survey of the literature. Next, he estimated the level of cost absorption (the "A" term in the formula) for that individual product, i.e. motor gasoline, by devising a study of the differences between the prices of motor gasoline on the New York spot market and the Rotterdam spot product market before and after the introduction of the Entitlements Program in November 1974. The New York-Rotterdam study used by Dr. Kalt covered the period 1968 through 1976. Underlying the New York-Rotterdam study is the valid notion that the effect of the introduction of the Entitlements Program was to give a subsidy, compared to world market prices, to each barrel of crude oil refined and sold in the United States. Dr. Kalt hypothesized that this subsidy would cause the price differential between the New York and Rotterdam spot markets to vary from the observed differential that existed prior to the advent of the Entitlements Program. Dr. Kalt attempted to measure the relationship between the subsidy and the variation in the differential between prices of leaded regular gasoline in the New York and Rotterdam markets. From this information he generated an absorption fraction for motor gasoline. Dr. Kalt then used the two estimates, i.e. the elasticity of demand (the "E_d" term) and the absorption fraction (the "A" term) for motor gasoline, to solve the incidence formula for the one unknown term, the elasticity of supply ("E_s" term) for that product. His method then calculated the estimated supply elasticities for a variety of products in the same way, and in turn used these values to estimate the supply elasticity of the "composite barrel" of refined petroleum products. The final step in this intricate process, much of which is not mentioned here, was to estimate composite barrel absorption fractions for each month in the period of the MDL 378 overcharges. *See* Doc. No. 190, Vol. 2, Exh. No. VIII.1 ("The Step-by-Step Calculation of Absorption Fractions"). Based on the

results of his analysis, Dr. Kalt concludes that in sales of motor gasoline, refiners passed through 69.5 percent and absorbed 30.5 percent of the change in the entitlements subsidy caused by the MDL 378 overcharges. *See* Doc. No. 190, Vol. 2, Table VII.14.

Apart from serious problems that were pointed out by testimony of Dr. Howard Pifer, the testimony of two other witnesses offered by Arco et al. — Dr. Rubinfeld and Dr. Tukey — lead us to believe that Dr. Kalt's analysis is fatally flawed. We have found that it analyzed the wrong events and asked the wrong questions. His conclusions are therefore not relevant to the question which the parties have attempted to answer, *viz.*, to what extent did the average prices of refined petroleum products rise when crude oil costs increased during the period when the MDL 378 overcharges occurred.

Dr. Kalt's testimony in this proceeding is directly derived from his previous work in determining the effect of the *advent* of the Entitlements Program, some of which has been published in book form. J. Kalt, *The Economics and Politics of Oil Price Regulation: Federal Policy in the Post-Embargo Era* (1981). That work had been reviewed and apparently utilized by federal policy makers during the mid-1970's to ascertain the effect the removal of crude oil price controls and the end of the Entitlements Program would exert on refined product prices, *see* Tr. at 499, and Dr. Hogan described Dr. Kalt's original work as "excellent . . . a major contribution." Tr. at 3307. In general, his work appears to be specified correctly if the question under study is the effect the introduction or termination of the Entitlements Program had or will have upon refined product prices.

This was confirmed by a number of witnesses. At the rebuttal hearing held in September 1984, Dr. Rubinfeld testified that: "in Prof. Kalt's analysis, . . . the bulk of the information available, that tells him about the subsidy coefficient, is the information about what happens between the pre-entitlement period and the entitlement

period. And that's important information statistically, to allow us to accurately estimate the coefficient." Tr. at 2823; *see also* Tr. at 2833. Dr. Tukey also testified that: "[m]ost of the information comes from the comparison of that earlier [pre-entitlement] period with these [first] 24 months [of the Entitlements Program]." Tr. at 3249. To explain this point further, he testified that three terms could be used to describe algebraically the information measured in Dr. Kalt's New York-Rotterdam study. Arco Exh. No. 27. Those three terms represent the information concerning (1) the pre-entitlements period (May 1968 through October 1974), (2) the change from pre- to post-entitlements period (the change between October and November 1974), and (3) the post-entitlements period (November 1974 through October 1976).

Dr. Tukey testified that it was the second term — the "sideways shift" from pre- to post-entitlements — which dominated Dr. Kalt's 1968-1976 New York-Rotterdam model. According to Dr. Tukey, "when the second term dominates, it tells you that the regression coefficient you got was mainly determined by the difference between the mean in the first segment and the mean in the second segment. . . ." Tr. at 3197. In response to questions from the hearing panel, Dr. Tukey went on to illustrate this point with a hypothetical example: the analysis of bank stock prices before and after the failure of a major bank. He indicated that if the analyst were interested only in the behavior of stock prices several years after the failure, he would be wise to exclude data from the time period *before* the failure from the regression in order to avoid getting a coefficient that was dominated by the difference between the means of the data from the two time periods. Tr. at 3197-201.

It is clear from Dr. Tukey's testimony that "the big difference in the means" dominates the 1968-1976 New York-Rotterdam regression model that was borrowed from Dr. Kalt's original economic research in the mid-1970's. It is equally clear that the question being analyzed

in this fact-finding cannot be answered by analyzing that big difference or even the variation within the final segment of Dr. Kalt's study — the first 24 months of the Entitlements Program. Rather, that question is better answered by analyzing the variation within the period between the advent of the Entitlements Program in November 1974 and the decontrol of oil prices in January 1981, since that is the period when the MDL 378 overcharges occurred. Dr. Kalt's model did not do this. Tr. at 2823. Instead, the 1968-1976 New York-Rotterdam model which Dr. Kalt has presented in this case still attempts to answer the question it was originally designed to answer, namely, what was the impact of the *advent* of the Entitlements Program. As Dr. Hogan testified, we are obviously dealing with a different question in this proceeding, Tr. at 3459, and any conclusions based on Dr. Kalt's 1968-1976 New York-Rotterdam study are not germane to our analysis. No party in the proceeding submitted a New York-Rotterdam study covering the time period in which the MDL 378 overcharges occurred.

Even though the model used by Dr. Kalt to estimate the elasticity of supply for refined petroleum products is flawed for our purposes, his testimony did propose a method of analysis — incidence analysis — which we believe is a useful way to address the question concerning the average absorption of crude oil overcharges by the domestic refining industry. As we noted above, incidence analysis was developed to quantify the effect a uniform tax would have upon the seller of the taxed item and the buyer. In other words, incidence analysis apportions the impact of a uniform tax upon the producer and consumer of an item. Since, as explained above, the Entitlements Program generally operated to distribute the MDL 378 overcharges uniformly among to each barrel of crude oil processed by domestic refiners, the overcharges are the economic equivalent of a uniform tax. Incidence analysis could be used to estimate the extent to which the domestic refining industry bore the impact of crude oil overcharges.

In order to use incidence analysis here, we must obtain estimates for the elasticities of demand and supply for refined petroleum products. The elasticity of demand for petroleum products has been studied at length, as was pointed out in our May 2, 1984 decision announcing the evidentiary hearing. With an estimate of the elasticity of *supply* of refined products, we can solve the incidence formula suggested by Dr. Kalt for the amount of absorption (the "A" term), which would be the amount of the impact of crude oil overcharges refiners did not pass through to customers.

Dr. Howard W. Pifer III, a witness presented by a group of state governments, offered an alternative method for calculating the elasticity of supply of refined products. Dr. Pifer was by far the most helpful witness who testified on behalf of the states. He is Managing Director of Putnam, Hayes & Bartlett, Inc., economic consultants. Although his ultimate conclusion — that the domestic refining industry passed on to its customers over 95 percent of the impact of the MDL 378 overcharges — was based upon an analysis of refiner cost banks and per barrel profits, which we have rejected as a basis for reaching a conclusion in this proceeding, he also testified about marginal economic analysis in great detail. Dr. Pifer was a very credible witness who contributed excellent testimony concerning the economic issues in this case.

Dr. Pifer's testimony included a technique for estimating the elasticity of supply for *crude oil* during the period of operation of the Entitlements Program. Pifer Exh. No. 9. The mathematical derivations of the supply elasticities contained on pages 4, 5, and 6 of that exhibit were subject to rigorous examination during the hearing, *see* Tr. at 2311 et seq., and the data used by Dr. Pifer was obtained from publicly available information published by the DOE's Economic Regulatory Administration. The elasticity of supply for crude oil estimated by Dr. Pifer ranges from 2.801 to 7.403. During the early portion of the 1974-

1981 period, the elasticity of supply hovered around 3.000, slowly rising to 6.510 in November 1978, decreasing to 4.110 in March 1980, and rising again until the end of price controls in January 1981. Pifer Exh. No. 9 at 4-6. This is the most credible evidence in the record regarding the elasticity of supply for crude oil during the time concerned. The derivation is mathematically correct, and it is essentially uncontroverted in the record.

In order to solve the absorption formula, however, we need to obtain the elasticity of supply for *refined products,* not the elasticity of supply for crude oil. This number is not available in the relevant literature for the appropriate time period, and has not been studied at length for any time period. Dr. Pifer testified that the elasticity of supply for refined products equals the properly weighted elasticities of supply for crude oil and refining services. Tr. at 2308-10. The latter supply elasticity is unknown, but Dr. Pifer testified that a conservative assumption would equate the elasticities of supply for crude oil and refined products. Although we are not certain regarding the appropriateness of the assumption, it was not challenged by any of the parties, and it or some other simplifying assumption is the only method we know which permits Dr. Pifer to use the elasticity of supply for crude oil alone to solve the incidence analysis absorption formula.

To solve the incidence formula,

$$A = \frac{E_d}{E_s + E_d}$$

Dr. Pifer used elasticities of demand for refined products ranging from 0.162 to 0.164, which he thought were more accurate than the figures used by Dr. Kalt, and elasticities of supply ranging from 2.877 to 5.803:

Year	Elasticity of Demand	Elasticity of Supply	Absorption
1974	0.162	2.877	5.3%
1975	0.162	2.970	5.2
1976	0.162	3.941	3.9
1977	0.162	4.463	3.5
1978	0.162	5.803	2.7
1979	0.163	4.658	3.4
1980	0.164	5.001	3.2

Pifer Exh. No. 9, at 7. As the table above shows, Dr. Pifer then concluded that incidence analysis would show that refiners absorbed between 2.7 and 5.3 percent of the cost increase caused by the MDL 378 overcharges during the operation of the Entitlements Program. It should be noted that substituting the elasticity of demand figures which Dr. Kalt preferred in Dr. Pifer's incidence calculations would change the results slightly. Using Dr. Kalt's elasticity of demand figures for the composite barrel, as reported in Doc. No. 190, Vol. 2, Table VIII.23, would show a range of cost absorption by refiners from 3.1 to 8.1 percent.

b. Economic Evidence Presented by End-users

Detailed econometric evidence regarding refiner cost absorption was also presented by Dr. Peter D. Linneman, an associate professor of finance and public management at the Wharton School of the University of Pennsylvania. Dr. Linneman appeared on behalf of a group of end-users denominated the "Philadelphia Electric Company et al." Like Dr. Kalt, Dr. Linneman was well-prepared and confident in his approach. He clarified his own written testimony to the hearing panel's satisfaction and readily departed from his analysis to give clear and concise answers to hypothetical questions. His grasp of the central issues was apparent, and he was therefore a helpful witness.

Dr. Linneman discussed a number of general statistical issues. He testified that a regression was successful when it answered the question asked. Tr. at 3893-94. He also

testified that it was not the case that a regression was successful just because it established a statistically validated relationship between a set of independent variables and a dependent variable. Tr. at 3892-95. He further testified that it was not the case that every statistical test was applicable to every regression. Tr. at 3902-05. In short, Dr. Linneman testified that regression diagnostics were not meant to be a series of mandatory hurdles that any regression was required to clear before it was considered acceptable. This latter testimony is important, because it touches on one of the principles which has guided our deliberations: we should not view the statistical issues as controlling and thereby overlook the underlying "common sense" economic issues. This testimony is consistent with the testimony of Drs. Hogan and Tukey, who also counseled the OHA hearing panel to follow these principles.

Like Dr. Kalt, Dr. Linneman focused exclusively on industry-wide data. He initially observed that refined product prices increased by approximately the same amounts as the amounts that crude oil prices rose during the period of the MDL 378 overcharges. From this observation, he concluded that refiners were generally able to pass through the impact of the MDL 378 overcharges. He presented economic models and regression analysis to support his view. Direct Testimony of Dr. Peter D. Linneman, Doc. No. 204. In their initial form, Dr. Linneman's models simply regressed crude oil prices against product prices. These models were criticized by a number of witnesses, primarily on the basis of their regression diagnostics. Some state witnesses, notably Drs. Pifer and Hogan, devoted a considerable amount of effort to improving the explanatory power of the Linneman models. As indicated below, we believe that a modified version of the basic Linneman model, like the basic incidence model, is sound. It yields a useful estimate of the extent to which refiners as a class absorbed the impact of the MDL 378 overcharges spread through the Entitlements Program.

Dr. Linneman's approach can be described simply. He characterized the problem to be solved as specifying the relationship between rising crude oil costs and rising product prices during the period in which MDL 378 overcharges occurred. Tr. at 1360. In his written testimony, Dr. Linneman suggested that as a general matter, the data showed that crude oil refiners passed on to downstream purchasers the vast majority of all crude oil cost increases during the period in which MDL 378 overcharges occurred. Since in his view the MDL 378 overcharges were functionally indistinguishable from any other cost increase incurred by domestic refiners during the period in which the overcharges occurred, Tr. at 1355-56, a view that was never credibly challenged, he argued that refiners must have absorbed very little of the MDL 378 overcharges.

In his written and oral testimony, Dr. Linneman used both incidence analysis and econometric evidence to support his argument. *See, e.g.,* Direct Testimony of Dr. Peter D. Linneman, Doc. No. 204, Tr. at 1378-81. Dr. Linneman used an alternative formulation of the incidence analysis formula used by Dr. Kalt. Tr. at 1368-69, 1378-79. Using algebraic manipulations, Dr. Linneman showed that absorption could be measured by looking at the ratio of the change in crude oil costs to the change in refined product prices. In technical terms, absorption could be viewed as one minus the passthrough fraction, which is equal to one minus the first derivative of crude oil costs with respect to refined product prices, or:

$$A = 1 - \frac{dP_p}{dP_c}$$

where P_c and P_p represent the prices of crude oil and refined petroleum products, respectively. Linneman Exh. No. 3. Unlike Dr. Kalt's New York-Rotterdam study, which used empirical data from the period 1968 through 1976, a period which mostly preceded the implementation of the Entitlements Program, this formulation allowed Dr. Linneman to utilize monthly average crude oil and

petroleum product prices for the very period at issue — July 1975 through January 1981. To accomplish his analysis, Dr. Linneman obtained this data from reports published by the Energy Information Administration of the Department of Energy. Tr. at 38[illegible]. Dr. Linneman concluded from his regression analysis of this data that when crude oil prices increased by a certain percentage, refined petroleum product prices increased by at least that same percentage. *E.g.*, Tr. at 3906-08. This would tend to indicate a full passthrough of crude oil cost increases, which is equivalent to no absorption by the domestic refining industry.

Serious objections to this simple approach were raised on cross-examination and in rebuttal testimony. Chief among these was the concern that Dr. Linneman's analysis did not "hold all other things constant." According to these critics, holding all other things constant is a basic requirement for the study of these phenomena and allows a careful analysis of the impact of the MDL 378 overcharges on refined product prices. *See, e.g.*, Tr. at 1697-98. In particular, it was asserted that Dr. Linneman's analysis did not hold constant: (i) demand for refined petroleum products; and (ii) nonproduct costs (the costs incurred by refiners for everything other than crude oil purchases). Tr. at 3763-71. It was argued that the addition of these independent variables to the analysis would increase the explanatory power of the Linneman model, Tr. at 1700, 2709, 2764, 2854-56, and the absence of these items made Dr. Linneman's analysis unreliable. Tr. at 3763. In addition, the extent of serial correlation in this model was considerable.

Dr. Linneman's initial work went through substantial revision during the course of the hearings, and myriad variations of his basic analysis were performed by Dr. Linneman and others. For example, Dr. Linneman first presented a model which analyzed the problem by dividing the time period of the MDL 378 overcharges into five segments. Direct Testimony of Dr. Peter D. Linneman,

Doc. No 204. In subsequent analyses the relationship between crude oil prices and refined product prices was examined over alternatively longer and shorter periods. At the suggestion of the hearing panel, Dr. Linneman developed a model that analyzed as one continuous series of monthly data the entire period in which MDL 378 overcharges occurred. Tr. at 1452-53.

Other variations on the basic Linneman approach were presented and discussed during the hearings. In view of the primary objection to Dr. Linneman's initial analysis — the failure to hold constant nonproduct costs and demand for petroleum products — Drs. Linneman, Pifer, and Hogan attempted to adjust Dr. Linneman's original work by introducing control variables which they asserted held these two variables constant. Linneman Exh. No. 1A, at 9, 10, 11; Tr. at 1421-23; Pifer Exh. No. 12; Tr. at 2339 et seq.; Doc. No. 217, Exh. 3. However, the results of models that included a factor that accounted for variations in nonproduct costs tended to corroborate the initial conclusion of Dr. Linneman that crude oil refiners absorbed little of the crude oil cost changes. Doc. No. 213, at 10 and Table 3. When Dr. Linneman added controls to account for increases in demand and nonproduct costs, he again concluded that refiners absorbed little of the cost increases associated with MDL 378 overcharges. Doc. No. 213, at Table 4.

The most useful revision examined in detail at the hearings used the Linneman data to examine the relationship of the *change* each month in crude oil prices to the monthly *change* in refined petroleum product prices. Tr. at 1699, 2346-48. This type of regression analysis model is commonly referred to as a "first differences" model, and has substantial intuitive appeal, since it is simple and directly addresses what we considered to be the primary question in determining the amount of the impact of MDL 378 overcharges borne by refiners as a class: during the period in which MDL 378 overcharges occurred, what

happened on average to refined product prices as crude oil prices rose by a relatively small amount?

In addition, the "first differences" model has the appeal of reducing, although not eliminating, serial correlation. In this situation, serial correlation in the error terms is not as disturbing as it might be because we expect that the relationship between the change in prices of crude oil and refined products in a given month is affected by that relationship in the preceding months. In the real world, we have seen that petroleum product pricing behavior is "sticky," and movements in one month are influenced by movements in the preceding months. Based on our observation of the market, we would not give much credence to a model that eliminated serial correlation altogether, because we know that the relationship between crude costs and product prices over time is somehow correlated, and does not reflect random behavior. Petroleum product pricing behavior can be presumed to be rational and related to input costs, and should not be expected to display random variation from month to month. As Drs. William A. Johnson and Pifer explained, this first differences model reduces serial correlation to a level which is intuitively acceptable because it does not observe the absolute price levels of crude oil and refined products, only the monthly changes in those price levels. Tr. at 1699, 2347-48. We believe that this model is properly specified and produces useful results.

Dr. Pifer reported the results of this analysis. He concluded that from July 1975 through January 1981, when refiners' crude oil costs increased, refiners as a class increased their prices to wholesale leaded gasoline customers by 96.6 percent of the crude oil cost increase. Pifer Exh. No. 12. This indicates that the domestic refining industry absorbed approximately 3.4 percent of the MDL 378 overcharges. It is significant that this result is very close to the result obtained with Dr. Kalt's basic incidence analysis model using elasticities generated by Dr. Pifer. These two different models, each of which we

believe to be properly specified, yield refiner absorption estimates that are independently derived yet consistent.

Another witness, Lee R. Howard, Vice President-Economics of the Air Transport Association of America (ATA), testified in detail on behalf of the nation's scheduled airlines. In his direct testimony, Mr. Howard agreed that incidence analysis is a technique that could appropriately be utilized in determining how much of the MDL 378 overcharges was absorbed by refiners as a class. Tr. at 362-63. However, Mr. Howard also disputed the elasticity estimates obtained by Dr. Kalt. He stated that the elasticity of demand for jet fuel is much lower than Dr. Kalt had suggested, because unlike other fuels it has no short-run substitutes, Tr. at 364, and that, as a result, demand for jet fuel is very insensitive to price. Mr. Howard stated that in contrast to Dr. Kalt's finding that elasticity of demand for jet fuel is 0.226, his review of the economic literature, Tr. at 376-79, and experience in the airline industry indicated that the elasticity of demand for jet fuel is 0.05. Tr. at 389.

In addition, Mr. Howard opined that the elasticity of supply for jet fuel is much higher than what Dr. Kalt had suggested in his study. In contrast to Dr. Kalt's findings that the elasticity of supply for jet fuel is 0.211, Mr. Howard opined that a better approximation for the elasticity of supply of jet fuel is the elasticity of supply for crude oil. Mr. Howard testified that his review of the literature indicated that the elasticity of supply of crude oil was approximately 1.0. *Id.*

Mr. Howard then computed the absorption fraction for jet fuel using his own estimations of elasticities of supply and demand. He concluded that if Dr. Kalt had used the correct figures for elasticity of demand and elasticity of supply for jet fuel, he would have concluded that refiners absorbed approximately five percent of the MDL 378 overcharges and passed through the remainder (approximately 95 percent) to their jet fuel customers. *Id.* Although this result is based on elasticity figures for a

single product rather than a "composite barrel" of refined products, it is significant because it comes from a properly specified model using a conservative estimate of the elasticity of supply for crude oil. Mr. Howard's opinion as to the elasticity of supply of crude oil appears to be low, compared to those derived by Dr. Pifer. Nevertheless, Mr. Howard's passthrough estimate for jet fuel falls within the range of estimated passthrough figures for all refined petroleum products yielded by the Kalt-Pifer incidence analysis model and the Linneman first differences model. One witness, Dr. Hogan, suggested that when several similar models, each properly specified, yield nearly identical estimates, one can have a high degree of confidence in the results. Tr. at 3309, 3371 et seq.

c. Economic Evidence Presented by State Governments

Four economic witnesses appeared at the evidentiary hearings on behalf of the 41 governmental jurisdictions participating in this proceeding. The testimony of three of those witnesses — Drs. E. Allen Jacobs, Perry Shapiro, and Howard W. Pifer, III — set forth their expert opinions as to the approach we should adopt in analyzing the problem before us. The fourth, Dr. William W. Hogan, appeared as a rebuttal witness who testified about statistical and econometric issues. The testimony of Drs. Pifer and Hogan has already been discussed.

Dr. E. Allen Jacobs is an assistant professor of finance and economics at the University of Texas. Dr. Perry Shapiro is a professor of economics at the University of California, Santa Barbara. Dr. Jacobs asserted that refiners passed through all of the impact of MDL 378 overcharges to consumers, and Dr. Shapiro asserted that it was impossible to determine who bore the impact of the MDL 378 overcharges by a preponderance of the evidence.

In his approach to the question of how much of the MDL 378 overcharges was borne by refiners, Dr. Jacobs

maintained that domestic refiners were not injured at all by the MDL overcharges. Tr. at 114. His testimony was not as convincing as that offered by the other economists. On cross-examination he was reluctant to explain his theory fully. Moreover, he admitted that the econometric analysis in his written submission was ultimately based on equations which assumed that refiners were able to pass through all of the MDL 378 overcharges. *See, e.g.*, Tr. at 274-88. Since that assumption was unproven, we were unable to accept his testimony as determinative.

Dr. Perry Shapiro also testified on behalf of state governments. The thrust of Dr. Shapiro's testimony was that when an economic model does not reflect what is occurring in the real world, fact-finding based upon that model is, in his opinion, untrustworthy. *E.g.*, Tr. at 2655-61. According to Dr. Shapiro, the petroleum industry is so complex that an economic simulation of the industry to determine cost absorption by domestic refiners is impossible. Tr. at 2656. Accordingly, he concluded that it is impossible to determine with any degree of confidence the absorption of the impact of MDL 378 overcharges by the domestic refining industry. Tr. at 2655-56.

Dr. Shapiro was not a convincing witness. He made no attempt to provide evidence addressing the relevant factual questions. Instead, he proceeded from the assumption that the task was impossible, and this foregone conclusion permeated his testimony. He did not assess the utility of making findings with respect to refiners as a class, as opposed to tracing the impact of the overcharges on individual firms. In general, he appeared to be poorly informed about the issues in this proceeding, *e.g.*, Tr. at 2726-30, especially the other theories presented at the evidentiary hearing. *E.g.*, Tr. at 2672-73, 2697-98.

One valid point which Dr. Shapiro's testimony made is that economic analysis as utilized in this proceeding is an estimation technique and, by definition, not a mathematically precise tracing of the overcharges through the domestic refining industry. *See* Tr. at 2656. There can be no

question that this is correct. As noted above, the record in this proceeding does not contain evidence that might trace the disposition of the MDL 378 overcharges with mathematical certainty; nor does the record trace overcharges to particular firms, with limited exceptions. Instead, we attempted to determine if there is substantial econometric evidence to support a conclusion regarding the extent to which refiners as a class absorbed the impact of the overcharges. The evidence assembled by the parties does not permit conclusions to be drawn about tracing the MDL 378 overcharges through a particular refiner's operations to determine the extent to which any individual firm absorbed the impact of the overcharges.

VI.

Findings of Fact

The specific findings of fact that are made in this report are based on the record compiled during the proceedings conducted in accordance with the District Court's October 13, 1983 Referral Decision, as clarified in the May 7, 1985 Order. That record consists of the written and oral testimony and exhibits discussed above, the briefs filed after the conclusion of the evidentiary hearings, and the oral argument held in October 1984. The findings also draw upon the institutional experience of the Office of Hearings and Appeals. The findings we are adopting comport with that experience during the period in which MDL 378 overcharges occurred.

Each of the methods presented for determining who bore the impact of the MDL 378 overcharges is subject to valid criticisms. One of those methods — refiner per-barrel profit analysis — is not relied upon in this report, except as part of the "big picture." The other — an analysis of refiner cost banks — is relied upon only to the extent that the absence of cost banks indicates complete passthrough of the impact of MDL 378 overcharges. Although marginal economic analysis rests upon assumptions and estimations, we find that the use of marginal

economic analysis with econometric estimation techniques provides the best possible indication of the extent to which the domestic refining industry bore the impact of the MDL 378 overcharges. Unlike the other methods suggested by some parties, marginal economic analysis answers an appropriate question, namely, to what extent did product prices rise when the refining industry experienced a small crude oil cost increase. It does not, however, answer the question with respect to any particular firm. As noted previously in this report, to determine the extent to which a particular refiner passed through the impact of the MDL 378 overcharges, a number of factors specific to the operations of that refiner must be analyzed. We know of no methodology that would accomplish analyses of those factors, and no party in this proceeding has suggested such a methodology. Marginal economic analysis analyzes industry-wide data and produces results which estimate the *average* amount of cost absorption by refiners as a class. The impact sustained by individual refiners will, of course, vary from the industry-wide average.

A. Direct Purchasers

Direct purchasers of MDL 378 crude oil paid unlawful prices for the crude oil and bore the initial impact of those overcharges. If the direct purchaser was a participant in the Crude Oil Entitlements Program, 10 C.F.R. § 211.67, it had an opportunity to report that crude oil as stripper well crude oil to the Department of Energy. As a result, its entitlements position was adjusted accordingly, and most of the impact was automatically passed on to all other participants in the Entitlements Program. However, since calculations made by the Department of Energy in implementing the Entitlements Program were made based upon average prices within each regulatory tier, some of the difference between the price actually charged for each barrel of the MDL 378 crude oil and the ceiling price for that crude oil may not have been passed on to participants in the Entitlements Program. In that

event, it would have been absorbed, at least initially, by the purchaser. The amount a direct purchaser was unable to pass on to participants in the Entitlements Program can be calculated by reference to the following formula:

Uncompensated amount = Amount actually paid
− (applicable tier ceiling price
+ tier entitlement benefit)

However, we also find that before concluding that a direct purchaser was injured, further inquiry is necessary. Substantial questions requiring analysis on a case-by-case basis have been raised in this area. For example, it has been suggested that some of the MDL 378 transactions reported by direct purchasers may not have occurred at arm's length, *see* Tr. at 116-17, and that other forms of compensation were received that obviated any apparent injury. *See* Tr. at 56, 64-65. The record to date is inconclusive on whether direct purchasers of the MDL 378 crude oil were actually injured by the overcharges.

B. Entitlements Program Participants

Direct purchasers of MDL 378 crude oil automatically passed on to participants in the Entitlements Program most, if not all, of the impact of the MDL 378 overcharges. This effect, which has been explained at length above, caused a concomitant increase in the cost of crude oil which was experienced by all domestic refiners. No evidence was submitted that would enable a fact-finder to trace the impact of the overcharges to individual refiners. Instead, the record contains a substantial amount of evidence of the parties' attempts to estimate the impact of the MDL 378 overcharges, as spread through the operation of the Entitlements Program, on the domestic refining industry as a whole. Finally, we note that the record does not contain a methodology for assessing whether individual refiners were actually in-

jured by the overcharges that were distributed to them through the Entitlements Program.

From the many different economic models presented by witnesses, we have selected three which we believe provide the best available answer in this record to the question concerning the absorption of MDL 378 overcharges by the domestic refining industry. Two of these models are based on Dr. Pifer's and Mr. Howard's use of the incidence analysis formula suggested by Dr. Kalt, and the third is the "first differences" regression model derived from Dr. Linneman's testimony. As explained above, when the best available data is used in these models, they can be used to derive the following estimates of absorption of the impact of MDL 378 overcharges by participants in the Crude Oil Entitlements Program:

Kalt/Pifer incidence analysis:	2.7 to 8.1 percent
Linneman regression analysis:	3.4 percent
Howard incidence analysis:	5.0 percent

Based on the evidence in the record before us, we have concluded that after first deducting valid claims (if any) from direct purchasers, the class of refiners absorbed from 2.7 to 8.1 percent of the impact on them of the MDL 378 overcharges. We also conclude that the class of refiners passed on the remainder of the crude oil cost increase caused by the MDL 378 overcharges in the form of increased prices for refined petroleum products.

A number of Entitlements Program participants were not commercial petroleum refiners. For these Entitlements Program participants such as public utilities, agricultural cooperatives, and municipalities, the impact of the MDL 378 overcharges was completely passed through to their customers. This impact is easy to calculate — it is equal to the amount by which the participant's entitlement benefits decreased in each month when the overcharges occurred.

C. Purchasers of Petroleum Products

Although the evidentiary proceeding focused on general methodologies which could be used to determine the impact of the MDL 378 overcharges on refiners as a class, the record also permits findings about the impact on another class that was affected by the overcharges: consumers of petroleum products who purchased directly from a refiner. This class includes airlines, public utilities, the federal government, and other large purchasers that used petroleum products in their businesses. The finding in this report that the class of refiners absorbed between 2.7 and 8.1 of the impact on them of the MDL 378 overcharges means that the class of refiners passed through between 91.9 and 97.3 percent of that impact to the class of consumers that purchased refined petroleum products directly from refiners.

In addition, a number of large consumers purchased products under contracts which provided for the pass-through of changes in Entitlements Program benefits. In those cases, the consumer absorbed 100 percent of the impact of the MDL 378 overcharges. The impact of the MDL 378 overcharges on members of this group can be calculated — it is equal to the amount by which the prices each firm paid to refiners under "entitlements-linked" contracts increased each month as the refiners' entitlements benefits were reduced by the MDL 378 overcharges.

Finally, there are two other classes of purchasers who were affected by the MDL 378 overcharges. These are (1) resellers of petroleum products, and (2) consumers of petroleum products who purchased products from a reseller. The evidentiary record which forms the basis for this report does not permit the OHA to make findings of

fact about the impact on the MDL 378 overcharges on these two classes.

GEORGE B. BREZNAY
Director
Office of Hearings and
Appeals

Date: June 19, 1985

APPENDIX A

List of Active Participants
Before the Office of Hearings and Appeals
in re Stripper Well Exemption Litigation

A. Johnson and Co.

Air Transport Association of America:

Air California
Air Florida
Alaska Airlines
Aloha Airlines
American Airlines
Best Airlines
Braniff International
Capitol Air
Continental Airlines
Delta Air Lines
Eastern Air Lines
Evergreen International
Federal Express
The Flying Tiger Line
Frontier Airlines
Hawaiian Airlines
Midway Airlines
Muse Air
Northwest Airlines
Ozark Air Lines
Pan American World Airways
Piedmont Airlines
PSA-Pacific Southwest Airlines
Trans World Airlines
Republic Airlines
USAir
United Airlines
Wien Air Alaska
Western Airlines

Alabama et al.:

Alabama
California
Connecticut
Idaho
Illinois
Indiana
Maryland
Michigan
Mississippi
Montana
New York
Ohio
South Dakota
Vermont
Wisconsin
Wyoming

American Independent Refiners
American Petrofina, Inc.
Arco et al.:

Atlantic Richfield Company
Champlin Petroleum Company
Conoco Inc.
Crystal Oil Company
Exxon Corporation
Gulf Oil Corporation
Marathon Petroleum Company

Mobil Oil Corporation
The Standard Oil Company (Ohio)
Suburban Propane Gas Corporation
Texaco Inc.

Arkansas et al.:

Arkansas	Delaware
Hawaii	Kansas
Massachusetts	Nevada
New Mexico	North Dakota
Pennsylvania	South Carolina
Texas	Virginia
West Virginia	Virgin Islands
Colorado	Georgia
Iowa	Louisiana
Minnesota	New Jersey
North Carolina	Oregon
Rhode Island	Tennessee
Utah	Guam
Dist. of Col.	

Ashland Oil, Inc.
Bigheart Pipe Line Corp.
Caribou Four Corners, Inc.
Celeron Oil and Gas Co.
Chevron U.S.A. Inc.
Commonwealth Oil Refining Co., Inc.
Consolidated Edison Company of New York, Inc.
Consumers Power Company
Crown Central Petroleum Corp.
Edison Electric Institute
Energy Watch
Farmers Union Central Exchange
Florida
Florida Power and Light Co.
Gulf States Oil and Refining Co.
Independent Gasoline Retailers
The Jobbers Coalition:
Arco Distributors Group

Sun Jobbers Group
National Association of Texaco Wholesalers Group
Illinois Petroleum Marketers Association Group
Kansas Gas and Electric Co.
Kerr McGee Corporation
Maine
Midland Cooperatives, Inc.
Missouri
National Consumer Law Center
National Cooperative Refiners Association
National Council of Farmers Cooperatives:
Farmers Union Central Exchange
Farmers Petroleum Cooperative, Inc.
FCX, Inc.
Landmark, Inc.
Land O' Lakes, Inc.
Midland Cooperatives, Inc.
MFA Oil Company, Inc.
Tennessee Farmers Cooperatives
National Oil Jobbers Council:
National Oil Jobbers Council
The Jobbers Group
The Navajo Nation
New England Electric Institute
New Hampshire
Peerless Petrochemicals, Inc.
Pennzoil, Inc.
Philadelphia Electric Company, et al.:
National Freight, Inc.
Philadelphia Electric Company
RJG Cab Co.
Geraldine H. Sweeny
Plateau, Inc.
Refined Product Resellers
Robert E. Plett Associates
San Diego Gas and Electric Co.
Service Station Dealers of America
Shell Oil Co.

Shepherd Oil, Inc.
South Carolina
Southern California Edison, Inc.
Southland Oil Co.
Southwestern Refining Co.
Sun Company, Inc.
System Fuels, Inc.
Tennessee Valley Authority
Tesoro Petroleum Corp.
Texas American Petrochemicals
Texas City Refining, Inc.
Tenneco Oil Co.
Tosco Corporation
Total Petroleum Inc.
Union Oil Company of California
U.S. Oil and Refining Co.
USA Petroleum, Inc.
Virginia Electric and Power Co.
Western Refining Co.

APPENDIX B

Department of Energy
Office of Hearings and Appeals

STRIPPER WELL EXEMPTION LITIGATION
HEF-0025
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Nos. 85-429, 85-430, 85-432, 85-440 and 85-444

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EXXON CORPORATION, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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December 23, 1985

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Did the District Court abuse its discretion under § 209 of the Economic Stabilization Act of 1970, as amended, in formulating a remedy for overcharges modeled on previous restitutionary legislation, where the spreading of the consequences of the violation to consumers throughout the economy made it impossible to determine the injuries of individual victims?

2. Do any of the petitioners raise a substantial question that the District Court erroneously denied them any procedural right?

LIST OF JURISDICTIONS JOINING IN THIS BRIEF

We accept the listing of parties below as set forth in the respective petitions; however, we here specifically list the jurisdictions which join in this brief.

Alabama
Arkansas
California
Colorado
Connecticut
Delaware
District of Columbia
Georgia
Guam
Hawaii
Idaho
Illinois
Indiana
Iowa
Kansas
Louisiana
Maine
Maryland
Massachusetts
Michigan
Minnesota
Mississippi
Montana
Nebraska
Nevada
New Hampshire
New Jersey
New Mexico
New York
North Carolina
North Dakota
Ohio
Oregon
Pennsylvania
Puerto Rico
Rhode Island
South Carolina
South Dakota [1]
Tennessee
Texas
Utah
Vermont
Virgin Islands
Virginia
West Virginia
Wisconsin
Wyoming

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[1] South Dakota joins in the brief as *amicus curiae* pursuant to Rule 36.4 of this Court.

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EXXON CORPORATION, *et al.*,
Petitioners,

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UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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BRIEF FOR THE STATE RESPONDENTS IN OPPOSITION [1]

COUNTERSTATEMENT OF THE CASE

This is an action brought by the United States under § 209 of the Economic Stabilization Act of 1970 ("ESA"),

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[1] This brief is filed on behalf of the States and other jurisdictions listed on p. ii, *supra*. Although we maintain that the courts below correctly resolved all questions of liability (including amount) in favor of the United States and against the Exxon Corporation ("Exxon"), because of the limited scope of the intervention which we were granted below, this brief does not respond to Exxon's petition for certiorari (No. 85-429), which presents no question concerning the distribution of the amounts for which Exxon was held liable.

The opinions below will be cited to the Appendix to the Exxon petition ("Exx. App.").

as amended,[2] against Exxon Corporation, alleging that the prices Exxon charged beginning in January 1975 for crude oil produced from the Hawkins Field Unit ("HFU") in Texas exceeded the maximum prices permitted by law. The District Court found in favor of the United States on the issue of liability. In fashioning an equitable remedy under § 209, the District Court accepted the Government's contention that, "[d]ue to the pervasive reach of oil price regulation at the time these overcharges occurred, . . . the overcharges worked their way throughout the economy nationwide to the *millions of ultimate consumers of petroleum products*," [3] and ordered Exxon "to make restitution of the full amount of the overcharges, plus interest, to the [United States] Treasury" [4], to be held in trust for immediate redistribution to the States,[5] in proportion to each State's share of nationwide consumption of petroleum products, for expenditures on energy-related programs designed to benefit their injured citizens.[6] TECA, which has exclusive appellate jurisdiction in all ESA and EPAA matters (see ESA § 211), affirmed the District Court's Order.

Four petitions for certiorari, in addition to that of Exxon, have been filed by intervenor-parties at virtually every level of distribution and use of petroleum products,

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[2] 12 U.S.C. § 1904 note, as incorporated by § 5(a)(1) of the Emergency Petroleum Allocation Act of 1973 ("EPAA"), as amended, 15 U.S.C. § 754(a)(1). In relevant part, § 209 of the ESA provides that a court may "order restitution of moneys received in violation of any . . . order or regulation [under this Title]."

[3] Exx. App. 239a (emphasis added).

[4] Exx. App. 254a.

[5] As used herein, the term "States" refers to all fifty States, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico and the Virgin Islands.

[6] Exx. App. 255a-256a.

from refiners to an individual motorist.[7] All challenge the District Court's restitutionary order and contend that awards should instead have been made to them (and to the classes which some purport to represent).

A. The Regulatory Program

The District Court's Order and TECA's affirmance rest squarely on the regulatory program which these decisions implement: we therefore begin by describing that program.

The EPAA, 15 U.S.C. § 751 *et seq.*, directed the President to promulgate regulations implementing price and allocation controls on petroleum and petroleum products, and further directed, in relevant part, that:

> [i]n specifying prices (or prescribing the manner for determining them), the regulation shall provide for (A) a dollar-for-dollar passthrough of net increases in the cost of crude oil, residual fuel oil, and refined petroleum products to all marketers or distributors at the retail level . . . [EPAA, § 4(b)(2), 15 U.S.C. § 753(b)(2)]

"Passthrough" is the key word in this passage and the cornerstone of the implementing regulations. From their

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[7] The four petitions were filed by: Marathon Petroleum Company, Mobil Oil Corporation, Murphy Oil Corporation, Ashland Oil, Inc., Pennzoil Company, Tenneco Oil Company, and Tosco Corporation (collectively "Marathon") (No. 85-430); Air Transport Association of America, Petroleum Marketers Association of America, The Jobbers' Group, and Independent Gasoline Retailers (collectively "ATA") (No. 85-432); Philadelphia Electric Company ("PECO") (No. 84-440); and National Freight Inc., RJG Cab Co. Inc., and Geraldine H. Sweeney (collectively "National Freight") (No. 85-444). These petitions and their appendices are referred to hereafter, respectively, as, "Mar. Pet." and "Mar. App.", "ATA Pet." and "ATA App.", "PECO Pet." and "PECO App.", and "Nat. Frt. Pet." and "Nat. Frt. App." The 45-volume Record of proceedings in the District Court as filed in the TECA will be referred to by volume number and page number as "— R. —."

adoption on January 14, 1974,[8] until all petroleum products were decontrolled on January 28, 1981,[9] the regulations promulgated pursuant to the EPAA permitted refiners, crude oil resellers and petroleum product resellers to pass through to their customers their net increases in crude oil costs for refined petroleum products, together with their increased costs of purchased refined products and certain "non-product" costs.[10] On August 30, 1974, the Department of Energy's ("DOE") predecessor agency, the Federal Energy Administration ("FEA"), published a Notice of Proposed Rulemaking concerning the Old Oil Allocation ("Entitlements") Program.[11] FEA stated that "[t]he objective of the entitlements program proposed is to achieve the equitable distribution of the low priced old oil among all sectors of the petroleum industry . . . ." (39 *Fed. Reg.* at 31650). FEA also commented that "[u]nder the proposal, all money spent or received as the result of the purchase or sale of entitlements would be passed through to consumers, either as a cost increase or decrease, respectively." (*Id.*).

Effective November 29, 1974, FEA adopted regulations instituting the Entitlements Program.[12] In keeping with the Congressional mandate that there be "dollar-for-dollar passthrough of the net increases in the cost of crude oil," 15 U.S.C. § 753(b)(2)(A), the regulations provided that the entitlements costs or proceeds would be included in crude oil cost calculations. In upholding the constitutionality and validity of the Entitlements Program, TECA explained:

> The basic purpose of the Entitlements Program was to spread the benefit of access to old price-controlled

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[8] *See* 39 *Fed. Reg.* 1924 (1974).

[9] *See* Exec. Order No. 12287; 46 *Fed. Reg.* 9909 (1981).

[10] *See* 10 C.F.R. § 212.83(c) and (d).

[11] *See* 39 *Fed. Reg.* 31650 (1974).

[12] *See* 10 C.F.R. § 211.67 (1974)

> oil and the burden of dependence on uncontrolled oil among all sectors of the petroleum industry, *all regions of the country, and among all consumers of petroleum products. . . .*[13]

As TECA stated in its opinion herein, one consequence of the Entitlements Program was that if, as happened here, price-controlled crude was improperly certified as exempt (or higher priced) crude oil, the effects of the overcharges initially would be distributed among all domestic refiners; thereupon "the regulatory system was designed to insure that money spent or received by the refiners as the result of their purchases or sales of entitlements would be passed along to the ultimate consumers." [14]

B. The Proceedings Below

1. *The District Court*

On June 8, 1978, DOE instituted this enforcement action against Exxon under § 209 of the ESA, alleging that the prices Exxon had been charging since January 1975 for crude oil produced from the HFU exceeded the maximum prices permitted by law. (I R. 16). In its prayer for relief, DOE urged the District Court to order Exxon to pay the overcharges, with interest, to the United States Treasury.[15] Over the ensuing 4 years, the District Court issued 8 reported opinions and over 100 separate

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[13] *Cities Service Co.* v. *FEA*, 529 F.2d 1016, 1021 (Em. App. 1975), *cert. denied*, 426 U.S. 947 (1976) (emphasis added).

[14] Exx. App. 87a, citing *Union Oil Co.* v. *DOE*, 688 F.2d 797, 802 (Em. App. 1982), *cert. denied*, 459 U.S. 1202 (1983). See also the decision of the District Court herein quoted at p. 7, *infra*.

[15] "Plaintiff prays that this Court enter judgment in its favor upon this Complaint: . . . 3. Ordering that Exxon make restitution of moneys, in the form of payments to the United States Treasury, equal to the amount of its overpricing for first sales of crude oil from the [Hawkins Field Unit];" (I R. 33).

orders, and TECA issued 3 reported opinions on interlocutory appeals brought by Exxon.

On August 27, 1982, DOE and Exxon filed cross-motions for summary judgment presenting both liability and remedy issues for decision. On November 24, 1982, five weeks *after* oral argument on the summary judgment, a group of 6 refiners, including 4 of the 7 petitioners in No. 85-430, and a trade association representing other refiners ("Indicated Refiners") filed a "Conditional Motion . . . To Intervene" in which they argued, as Exxon had, that "it is impossible to trace the impact of the overcharges," and that, based upon precedent in private antitrust damage actions, refiners should receive the entire overcharge fund (XLV R. 38973). Some three months *after* oral argument, 5 gasoline station operators ("Gasoline Retailers"), purporting to represent 187,000 independent branded retailers throughout the United States, filed a motion for limited intervention in the District Court; they urged that the "impact of the overcharge" should be traced through the DOE Entitlements Program to the "more than 200 refiners nationwide" and then, "taking into account each refiner's banked costs" and DOE's "[c]omprehensive compliance audits", to all "purchasers of refined products throughout the period of violation" (XLV R. 38995-38997). At Exxon's request, the District Court stayed consideration of both the Indicated Refiners' and the Gasoline Retailers' intervention motions. (ATA App. A-288 and A-289.)

On March 25, 1983, the District Court issued its Memorandum Opinion holding Exxon liable for some $895 million in crude oil overcharges between January 1975 and January 1981, plus interest. The District Court determined that, as a matter of law, Exxon was required to change its accounting practices relating to Hawkins Field crude oil on January 1, 1975, and that there was no factual dispute as to its failure to do so.

In fashioning an equitable remedy under § 209 of the ESA, the District Court determined that "the overcharges worked their way throughout the economy nationwide to the *millions of ultimate consumers of petroleum products.*" [16] Following TECA's prior holding concerning the operation of the Entitlements Program, the District Court reasoned that "[j]ust as the program spread the benefit of access to old oil, so too did the program spread the burden of Exxon's overcharges among all sectors of the petroleum industry, all regions, and all consumers [of petroleum products]." [17] The District Court also referred to record evidence of Exxon's admitted understanding of this impact [18] as well as the cost-passthrough effects of DOE's price regulations.[19] It determined:

> Exxon's overcharges were not, as it simplistically asserts, borne by Exxon itself, but instead were borne by ultimate consumers of petroleum products throughout the entire country.[20]

Accordingly, the District Court found that:

> [t]he broad scattering of the ill effects of Exxon's wrongdoing renders impossible the tracing of the overcharges to their ultimate victims and the calculation of the precise damages suffered by each.[21]

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[16] Exx. App. 239a (emphasis added).

[17] Exx. App. at 248a, citing *Cities Service Co.* v. *FEA*, p. 5 n.13, *supra*. *See also id.* at 248a-249a, quoting *Union Oil Co.* v. *DOE*, *supra*, p. 5, n.14.

[18] Exx. App. 248a-249a.

[19] Exx. App. 249a, citing 10 C.F.R. § 212.83(c)(2)(iii) and 10 C.F.R., Part 212, Subparts F and L.

[20] Exx. App. 249a. Based on this finding, the District Court initially denied the conditional intervention motion of the Indicated Refiners and the motion for limited intervention of the Gasoline Retailers. Exx. App. 249a, n.56.

[21] Exx. App. 250a.

The District Court ordered Exxon "to make restitution of the full amount of the overcharges, plus interest, to the [United States] Treasury" [22] to be held "in trust" [23] for distribution to the States, in proportion to each State's share of nationwide consumption of petroleum products, for use in energy-related programs designed to benefit their injured citizens.[24] The procedures for disbursement to the States were modeled on the Congressional enactment of § 155 of the Further Continuing Appropriations Act, 1983.[25] The District Court explained:

> *In formulating its order, the court in no way relies on Section 155 as an express statutory grant of authority to this court, but acts instead in the exercise of its broad equitable powers to order restitution.* However, Section 155 clearly bespeaks the intent of Congress that violators of the petroleum price regulations should be made to disgorge their illgotten gains even in situations, like the case before the court, where the victims of the petroleum overcharges cannot be identified. The colossal scale of Exxon's wrongdoing, and the workings of pervasive regulations to spread the burden of that wrongdoing impossibly far and wide, must not deter this court from fashioning an appropriate equitable remedy. The purpose of the domestic petroleum price regulations was to keep oil prices down, to relieve consumers of some of the burden of towering oil costs.

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[22] Exx. App. 254a.

[23] District Court Judgment, XXXV R. 31658 at 31659.

[24] Exx. App. 255a-256a. The programs are listed *infra* at p. 20, n.41.

[25] Pub. L. No. 97-377, 96 Stat. 1830, 1919, § 155 (1982) ("Warner Amendment" or the "Amendment"), reproduced at ATA App. A-316. In the Warner Amendment, Congress directed the Secretary of Energy to distribute up to $200 million in escrowed overcharge funds for energy related uses by the States in proportion to the relative consumption of both price-controlled and uncontrolled petroleum products in each State during the period in which price controls were in effect.

> The five energy conservation programs identified in Section 155 operate acros the nation to reduce that same burden, either by reducing overall consumption through conservation or by direct financial assistance to those most in need. *Although one might speculate as to alternative remedies, this court respects the wisdom of the solution chosen by Congress and shall adopt it as the most appropriate equitable remedy in the circumstances of this case.* [Exx. App. 256a, footnote omitted, emphasis added.]

Thereafter 33 States and Territories and the District of Columbia were allowed to intervene to support the District Court's restitution order on appeal.[26] Six additional separate motions to intervene were filed by a joint total of 14 parties, including refiners, jobbers, utilities, a trucking company, a taxicab company, and an individual motorist. Each of these motions sought only to intervene for purposes of appeal. None moved the District Court to reopen the record on the question of the feasibility of tracing the effect of the overcharges or for a hearing on or reconsideration of any issue. The District Court granted all applications for intervention, including on reconsideration those of the Indicated Refiners and the Gasoline Retailers, for the purpose of arguing the remedy issue on appeal. (*See* ATA App. A-290 through A-298).

2. *The Court of Appeals*

On appeal, TECA unanimously affirmed the judgment of liability against Exxon. By a 2-1 vote, TECA also affirmed the District Court's remedy under § 209.

TECA rejected the contention "that the trial court was required to trace, or attempt to trace, the overcharges from first purchaser, to refiner, through various monthly accountings required by the Entitlements Program and its 'banking' system, and then to determine the nature

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[26] Subsequently, 12 additional States intervened for the same purpose before TECA.

and extent of any passthrough of increased costs through the distribution system, such as might be authorized by 10 C.F.R. Section 212.83(c)-(d) (refiners) and 212.93(a) (resellers and retailers)." (Exx. App. 85a). TECA agreed with the District Court that:

> any attempt to trace the overcharges would be doomed to failure because of the pervasive influence of the Entitlements Program and other regulations which had the effect of passing on and diffusing the HFU overcharges through the distribution system. [Exx. App. 86a-87a.]

TECA explained the consequences of the Entitlements Program whereby overcharges would be passed along to the ultimate consumers (Exx. App. 87a; *see* pp. 3 to 5, *supra*) and continued:

> We agree with the trial court's conclusion that any attempt to trace increased costs attributable to the HFU overcharges would require a full scale audit of the entire petroleum industry, and that any effort to do so would be futile. As the Government suggests, the first step in any such audit would require recalculating over seventy monthly entitlement lists issued during the period of the overcharges, taking into account such variables as the volumes of new and old oil produced during each month, the average acquisition costs, and the values of each entitlement. In determining the precise impact of the overcharges on any particular refiner, it would then be necessary to consider the impact of exception relief which may have been granted by the agency over the term of the Entitlements Program.
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> * * *
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> Even if the HFU overcharges could be traced to individual refiners, it would then be necessary to trace their effect on product resellers, retailers and consumers, through the provisions of passthrough regulations. That this task would be futile is illustrated by the difficulty of applying only one aspect of the regulations, that is, the calculation of "banked

> costs." Exxon itself admitted that it was unable to supply information on its own costs. . . .
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> * * *
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> The fact that banked costs might exist as to any particular refiner does not mean of course that increased costs were not passed on through the distribution system. To determine this would require an investigation into the state of mind of each refiner in setting prices for individual petroleum products each month. Such a task would be impossible, and several of the intervenors have so conceded. [Exx. App. 88a-90a.]

TECA rejected the refiners' suggestion "that refunds be made payable to themselves as 'first purchasers' [because] that would result in inequities, inconsistent with the fundamental purpose of restitution under Section 209." (Exx. App. 90a). Moreover, TECA ruled:

> There was no need for the District Court in this action to attempt the impossible task of attempting to ascertain the damage sustained by individual consumers of petroleum products. In this respect, it should be noted that this action for restitution under Section 209 differs in significant degree from a private action of damages under Section 210 [Exx. App. 90a-91a.]

In conclusion, TECA approved the "form of relief chosen by the trial court in this action by which the restitution funds will be channeled through the states for use in the enumerated energy programs designed to benefit the consuming public . . . ." (Exx. App. 91a):

> We believe this form of disbursement to be equitable, and fair, and a reasonable method of compensating the consuming public for the HFU overcharges. It accomplishes the intent of Congress that violators of the price regulations be required to disgorge their gains, even in situations where it may not be possi-

> ble to identify and compensate each individual victim. While other remedies might have been adopted by the trial court, the remedy chosen avoids further administrative delay and confusion, with additional costs, it prevents the frustration of congressional objectives in securing prompt enforcement of what has been denominated as "emergency" price regulations, and it is a reasonable means to protect the public interest. [Exx. App. 91a-92a, footnote omitted.]

Petitions for rehearing and/or suggestions for rehearing *en banc* filed by Exxon and several intervenor appellants were denied. (Exx. App. 269a-270a). On October 23, 1985, TECA denied a motion by Marathon, Mobil and Murphy for leave to file a second petition for rehearing.

REASONS FOR DENYING THE PETITIONS

The several petitions filed herein uniformly fail to demonstrate that there are, as Rule 17 requires, "special and important reasons" for this Court to grant another round of review of the District Court's exercise of its equitable discretion in formulating a restitutionary remedy for this case. The remedy chosen rests on the District Court's reasoned conclusion—based upon the regulatory scheme and the voluminous record before it—that the consequences of Exxon's overcharges were spread throughout the economy so that individual victims and amounts of injury cannot possibly be identified and that, ultimately, all oil products consumers nationwide suffered as a result of the overcharges. Accordingly, the District Court fashioned a well-grounded remedy to benefit those ultimate consumers.

In turn, TECA, "a court intimately familiar with the intricacies of federal energy regulations," (*Tully* v. *Mobil Oil Co.*, 455 U.S. 245, 248 (1982)), and empowered with exclusive appellate jurisdiction in these matters, agreed with the District Court's findings, and approved its choice

of remedy as "equitable, and fair, and a reasonable method of compensating the consuming public for the . . . overcharges". (Exx. App. 91a). In so ruling, TECA observed that "other remedies might have been adopted by the trial court" (Exx. App. 92a), and thus refrained from limiting future decisions in similar cases. Thus, far from deciding any "important question of federal law which has not been, but should be settled by this Court", it merely applied its long experience with and expertise in the regulatory mechanism it supervises to confirm that the District Court's restitutionary choice not only fell within the broad equitable discretion which prior opinions of this Court and TECA had already settled, but was a commendable exercise of that discretion in the complex context of the particular regulatory violation at issue, where identification of individual injury among many millions of potential claimants was impossible. Petitioners' attempt to narrow this discretion, and to have this Court require the trial court in every case to attempt identification of individual injury even where that task is impossible, lacks both logic and precedent.

Finally, the petitioners' various contentions that they were improperly denied procedural rights are wholly without merit. The only petitioners who sought intervention in the District Court prior to the entry of judgment did so well after final oral argument on the summary judgment motions, and their intervention papers merely added reasons for a finding of impossibility, as described above. All other petitioners requested—and were granted—intervention only for purposes of appeal. Thus, there has been no departure "from the accepted and usual course of judicial proceedings" requiring further review by this Court.

I. TECA'S AFFIRMANCE OF THE DISTRICT COURT'S EXERCISE OF ITS EQUITABLE DISCRETION RAISES NO ISSUE WARRANTING FURTHER REVIEW BY THIS COURT

A. Because Section 209 Of The ESA Vested The District Court With Broad Equitable Powers, The Scope Of "Appellate Review Is Correspondingly Narrow"

Section 209 of the ESA, under which the United States brought this suit against Exxon, provides that, in addition to the power to issue mandatory injunctions granted therein, "the court may also order restitution of moneys received in violation of any . . . order or regulation [under this Title]." The District Court was thus vested with broad discretionary power.[27] As Justice Harlan wrote in *Mitchell* v. *DeMario Jewelry, Inc.*, 361 U.S. 288, 291-292 (1960):

> When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes.

Justice Harlan also quoted with approval and followed this Court's decision on the scope of equitable jurisdiction under § 205(a) of the Emergency Price Control Act of 1942, *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946):

> Thus the Administrator invoked the jurisdiction of the District Court to enjoin acts and practices made illegal by the Act and to enforce compliance with the Act. Such a jurisdiction is an equitable one. Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a pro-

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[27] Exx. App. 86a; *Citronelle-Mobile Gathering, Inc.* v. *Edwards*, 669 F.2d 717, 721-722 (Em. App.), *cert. denied*, 459 U.S. 877 (1982); *Sauder* v. *DOE*, 648 F.2d 1341, 1348 (Em. App. 1981).

> ceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake . . .
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> Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." *Brown* v. *Swann*, 10 Pet. 497, 503. [361 U.S. at 292, quoting 328 U.S. 397-398].

These decisions give special force herein to a corollary of the trial court's "broad discretionary power" in shaping equity decrees—that "appellate review is correspondingly narrow." *See Lemon* v. *Kurtzman*, 411 U.S. 192, 200 (1973) (Op. of Burger, C.J.). *A fortiori*, where as here, the Court of Appeals has approved as "equitable, and fair, and . . . reasonable" the District Court's exercise of its equitable jurisdiction, only a most compelling showing of abuse could justify a second round of review by this Court. No such showing has been made by any of the petitioners herein.[28]

B. The Remedy Chosen By The District Court Was Well-Grounded In Fact And Law

1. The Record And Regulatory Scheme Made It Clear That It Was Impossible To Trace The Impact Of Exxon's Overcharges To Individual Victims

The District Court found, on the basis of the record before it: "The broad scattering of the ill effects of Exxon's wrongdoing renders impossible the tracing of

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[28] Petitioners are not identically situated substantively or procedurally. Where pertinent in this discussion, we will identify particular petitions or petitioners. Otherwise, the term "petitioners" will mean some or all of those identified in n.7, *supra*.

the overcharges to their ultimate victims and the calculation of the precise damages suffered by each." (Ex. App. 250a).[29] (See p. 7 *supra*). TECA "agree[d] with the trial court that any attempt to trace increased costs attributable to the HFU overcharges would require a full-scale audit of the entire petroleum industry, and that any effort to do so would be futile." (Exx. App. 88a). It explained that conclusion by detailed examination of the regulatory scheme, about which it has developed special expertise in the exercise of its exclusive appellate jurisdiction.

Petitioners point to no evidence which was in the record before the District Court which contradicts, let alone renders unreasonable, the District Court's and TECA's conclusion that the ultimate victims of Exxon's overcharges and the extent of their individual injuries cannot be ascertained in any manageable proceeding. Nor did any of the petitioners offer to present such evidence to the trial court in motions to intervene or otherwise. Here, however, they rely on a 1985 report by DOE's Office of Hearing and Appeals (the "OHA report") in a separate, ongoing proceeding.[30] That report, obviously,

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[29] The tracing issue was vigorously litigated before the District Court entered judgment. As that court observed, in order "to postpone its day of reckoning" Exxon had argued:

> that it must be allowed to conduct further discovery to determine if the Entitlements Program in fact operated as it was designed and to trace the Hawkins Field overcharges to their ultimate victims. In effect, Exxon would like to launch a nationwide inquiry into the workings of more than 200 domestic refiners during a period of several years. [Exx. App. at 247a-248a.]

[30] Report of the OHA to the United States District Court for the District of Kansas in *Department of Energy Stripper Well Exemption Litigation* (*"Stripper Well Litigation"*), M.D.L. No. 378, reproduced in ATA App. at A-320. Although OHA's factfinding in the *Stripper Well Litigation* should have no bearing upon the correctness of the District Court's earlier findings in this case, based upon the record at the time judgment was entered, the States note

was not before the District Court when it rendered its decision or thereafter. In fact, the OHA report was issued on June 21, 1985, more than a year after oral argument of this case before TECA and less than two weeks before TECA issued its opinion affirming the District Court.[31] The District Court's finding cannot be overturned on the basis of a report which was not before it.[32] Nor can it be overturned on the basis of a criticism of that report,

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that, like the District Court here, the recent report found, after nearly two years of effort, that:

> it is impossible to trace these increased costs [of crude oil to all domestic refiners] through an individual refiner's refining, distribution and marketing operations. In fact, no party sought to establish such a tracing in the context of this proceeding, or suggested a valid tracing methodology based on inspection of an individual refiner. [ATA App. A-339.]

[31] ATA's assertion that the "very facts" which it alleges concerning the possibility of tracing "appear *in the instant record* in the form of a detailed fact finding report by the OHA" (ATA Pet. 14) is, therefore, incorrect. Indeed, when the OHA report was submitted to TECA that court was careful to provide only "that the Report of OHA of June 21, 1985 be filed in the Office of the Clerk of this Court." Order Denying Without Prejudice Motion To Permit Parties To File A Supplemental Brief On The Significance Of The June 21, 1985 OHA Report And Granting Leave To File The Report. (ATA App. at A-189.)

[32] Indeed, the Kansas district court has not yet decided whether to adopt the OHA report. Moreover, in relying on that report for the proposition that it would be feasible to trace the injuries of the victims of the overcharges, petitioners fail to take due account of the two serious deficiencies which that report itself acknowledges:

First, the report rests on assumptions and estimates which it admits are subject to valid criticism. It is, in its own terms, only one theoretical estimate of the impact on the refining industry as a whole if a particular set of contested assumptions is applied.

Second, as the report states, *no methodology exists by which to determine the impact on any particular refiner, much less downstream customers of any refiner or direct purchaser.* *See* n.30, *supra*; ATA App. at A-346, A-380 to A-381.

as three refiners remarkably argue in a supplemental brief.[33]

2. *The Restitutionary Remedy Selected By The District Court Was Equitable, Fair and Reasonable*

The District Court's decision to look to the Warner Amendment (also referred to as "§ 155") as the model for its choice of restitutionary distribution to benefit consumers was a sound exercise of its discretion since "the victims of the petroleum overcharges cannot be identified." (Exx. App. 256).[34] Three points about the Amendment are especially noteworthy. First, Congress stated that where particular injured individuals "cannot be *reasonably* identified," or their injury "is too small to be capable of *reasonable* determination," a refund for energy related purposes through the States is one which is "*reasonably* expected to benefit the class of persons injured." § 155(a) (emphasis added).[35] Second, in choosing a State-

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[33] *See* Supplemental Brief of Petitioners Marathon, Mobil, and Murphy in Support of Petitioners (No. 85-430). The materials which that brief presents concerning a controversy over various drafts of the OHA report are, of course, entirely outside the record which was before the District Court and before TECA when it affirmed. It is a measure of these petitioners' desperation that they must rely on such materials, and on the contention that OHA's supposed bias creates a due process issue under *Tumey* v. *Ohio*, 273 U.S. 510 (1927), in order to seek review of a judgment which did not in any way depend on the OHA report.

[34] Because of the change of circumstances resulting from decontrol in 1981, previous mechanisms for passing refunds along the distribution chain to ultimate consumers no longer exist. Thus, as TECA stated, refunds to first purchasers would "result in inequities, inconsistent with the fundamental purpose of restitution under § 209." (Exx. App. 90a).

[35] *See, e.g.*, 128 Cong. Rec. S15116 (daily ed. Dec. 16, 1982) (statement of Senator Percy):

> This money would come from $200 million now in escrow which has been collected from oil company overcharges to consumers during the seventies. This money rightfully belongs to the con-

based remedy, Congress necessarily found that paying such funds to the States, in proportion to their oil product consumption and on behalf of their injured citizens for energy related purposes, is "restitutional." *Id.* Third, in adopting the Amendment, Congress confirmed the propriety of DOE's repeated use of the State remedy to benefit ultimate consumers,[36] and accelerated what DOE had been intending to do with escrowed overcharge funds even without Congressional action, *i.e.*, distribute funds to States on behalf of ultimate consumers.[37]

The petitioners' primary disagreement with the District Court's remedy is, of course, that they would prefer to receive the money themselves. While they do raise objections directed specifically to the use of the Warner Amendment, these do not have any merit.

a. Petitioners argue that the District Court should not have turned to the Warner Amendment as a model be-

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sumers who were actually overcharged during this period. But because it is impossible to identify each individual consumer, we should at least attempt to place this money where consumers in general will benefit. Distribution to the States provides the quickest means to get this money out.

[36] *See e.g., Alfred B. Alkek*, 9 DOE ¶ 82,521, at p. 85,134 (1982) ("We chose to distribute the money to state governments because we believed that they would be able to design a distribution scheme for the refund proceeds which would benefit all injured consumers in each state, and account for the varying energy-related needs of their citizens. We also believe that the states would be able to expend the proceeds in an administratively efficient and cost-effective manner."); *Adams Resources and Energy, Inc.*, 9 DOE ¶ 82,553 at p. 85,292 (1982).

[37] In proposing the Amendment, Senator Warner stated: "The Department of Energy is seeking to provide secondary remedies to State governments and is currently reviewing a distribution plan which I understand is consistent with this amendment." 128 Cong. Rec. S15115 (daily ed. Dec. 16, 1982). *See also* 128 Cong. Rec. S15701 (daily ed. Dec. 20, 1982) (statement of Senator Kennedy): "DOE has in part been proceeding in this fashion. It is the most appropriate method of providing restitution for the injuries suffered by the consumer."

cause the Amendment provided only for a one-time distribution of funds. The argument overlooks the court's clear statement that it was "in no way rel[ying] on Section 155 as an express statutory grant of authority to this court but [was acting] instead in the exercise of its broad equitable power to order restitution." (Exx. App. 256a, quoted at p. 8, *supra*).[38] Congress' decision not to *compel* future distribution on the basis of the Warner Amendment formula[39] cannot be taken as precluding a court of equity from choosing to do what Congress had done and for similar reasons.[40] "Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction." *DeMario Jewelry*, 361 U.S. at 291, *quoting Porter*, 328 U.S. at 398; *see also Hecht Co.* v. *Bowles*, 321 U.S. 321, 330 (1944).

b. Some petitioners present undocumented assertions that they will not receive any benefit at all from the programs which the States must fund under the District Court's order.[41] While there is no requirement that the

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[38] This fact renders frivolous the assertion of the National Freight petitioners that by selecting the approach of the Warner Amendment, the District Court violated the constitutional separation of powers. (Nat. Frt. Pet. 13-14, 21-22).

[39] The Senate-passed version made the Warner mechanism *mandatory* in all future cases. *See* 128 Cong. Rec. S15117 (daily ed., Dec. 16, 1982).

[40] Petitioners rely especially on the comments of Congressman Dingell as forbidding any use of the Warner Amendment as precedent; but, where, as shown above, the statute on its face makes clear Congress' view that its own remedy was reasonable and restitutionary, a court may accept the soundness of that judgment.

[41] The five Federal energy conservation programs involve (1) weatherization of buildings (*see* 42 U.S.C. § 6861 *et seq.*); (2) implementation of State energy conservation programs (*see* 42 U.S.C. § 6321 *et seq.*); (3) reduction of energy consumption in, or the funding of alternate energy sources for, schools and hospitals (see 42 U.S.C. § 6371 *et seq.*); (4) promotion of conservation by small businesses and individuals, (*see* 42 U.S.C. § 7001 *et seq.*); and (5)

remedy adopted by the court directly benefit each person who was injured by the overcharges, it is plain that petitioners' view of these programs is far too narrow. For example, State energy conservation plans are intended to reduce total energy consumption by all citizens and businesses within the State. *See* 42 U.S.C. § 6322(a)(1).[42] A reduction in demand can lower oil product prices, benefitting all buyers, especially commercial users, in proportion to consumptio and in long-range terms will reduce the dangers of ha nful energy shortages. Moreover, the provisions which are listed in the District Court's order are sufficiently broad and flexible to permit funding of programs which would quite specifically benefit businesses such as those represented by various petitioners. Without attempting to be exhaustive, we note in the margin some possibilities which readily come to mind.[43]

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assistance to low-income people in paying home utility bills (*see* 42 U.S.C. § 8621, *et seq.*). *See* Exx. App. 255a, n.58.

[42] To achieve that goal, the plans are *required* to promote more efficient lighting for public buildings and thermal efficiency standards and insulation requirements for new and renovated buildings. 42 U.S.C. § 6322(c). The States are further permitted to adopt transportation controls, programs of public education, and "any other appropriate method or programs to conserve and to improve efficiency in the use of energy." 42 U.S.C. § 6322(d)(5).

[43] State energy conservation plans are intended to be coordinated with the operation of State energy extension service plans, 42 U.S.C. § 7005(h), which in turn allow the States to provide on-site energy use evaluations and recommendations to consumers and businesses, including information about the availability of aid for "planning, financing, installation, and effective monitoring of energy-related facilities and activities." 42 U.S.C. § 7004(b)(6) and (b)(7). Airports and airlines could seek aid for airport improvements to reduce fuel burning caused by delays in landing time under these provisions. Part 450 of 10 C.F.R. contains a list of energy conservation measures already approved by DOE for implementation by State energy extension services with both residential and industrial applications, including, for example, audits, insulation measures, control systems and installation of high efficiency

In short, it was fully appropriate for the District Court to look "at the policy of the legislation and fashion[] a remedy that will effectuate that policy," *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 457 (1957), and in doing so, (as the District Court said) to "respect[] the wisdom of the solution chosen by Congress and [to] adopt it as the most appropriate equitable remedy in the circumstances of this case." (Exx. App. at 256a).

3. *TECA's Decision is Entirely Consistent With This Court's Decisions*

TECA in this case and in its prior decisions has fully attended to this Court's major teaching in *Porter* v. *Warner Holding Co.*, *supra*, that in these public enforcement cases, courts should exercise broad and flexible powers to do equity.[44] Nevertheless, citing private damage action precedents, and ignoring *Porter's* distinction between such private actions and public restitution actions,[45] petitioners argue that *Porter* restricted the scope of equitable jurisdiction, and required individual injury determinations in every overcharge restitution case. They do so by tearing out of context the concluding paragraph of the *Porter* opinion, from which they quote.[46] That paragraph

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equipment. These are precisely the type of efforts in which many utilities already engage and which the States could help finance under the remedy adopted by the District Court.

[44] *See Citronelle-Mobile* and *Sauder*, p. 14, n.27, *supra*.

[45] "Restitution, which lies within that equitable jurisdiction [granted by § 205(a) of the 1942 price control Act] is consistent with and differs greatly from the damages and penalties which may be awarded under § 205(e)." 328 U.S. at 402.

[46] Marathon's argument that by "restitution, Congress meant the refund of overcharges to the party injured" as in *United States* v. *Lieb*, 333 F. Supp. 424 (W.D. Tex. 1971), *aff'd*, 462 F.2d 1161 (Em. App. 1972) (Mar. Pet. 15), is wholly without merit. Where Congress takes pain to confirm an expressly "inherent equitable power" of historically large scope, its action is not to be construed as nar-

set forth the trial court's authority and responsibility on remand to resolve "conflicting claims and counterclaims between tenants and landlord as to the amounts due . . ." (328 U.S. at 403). The "interested parties" whom the trial court was instructed to bring in, if necessary, were the tenants against whom the landlord had such counterclaims, a small and readily ascertainable class.[47] The purpose of bringing them in was not to allow them to assert claims for restitution (which the Secretary was doing on their behalf) but to enable the court to adjudicate any "counterclaims" against them by the landlord.

Because "[t]he broad scattering of the ill effects of Exxon's wrongdoing renders impossible the tracing of the overcharges to their ultimate victims and the calculation of the precise damages suffered by each," [48] the teachings of *Porter* which are truly applicable in this case are those which forcefully affirm the broad powers of the courts of equity to fashion a restitutionary remedy, *see* pp. 14 to 15, *supra*. Petitioners' insistence that proceedings were required which would enable them, and the literally countless other persons and entities who were similarly

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rowing the courts' discretion by requiring them to conform to the particular circumstance of a case which is cited in the legislative history to illustrate that the power already exists.

[47] This portion of the *Porter* opinion was a response to the landlord's argument, based on evidence that he "may have valid counterclaims against certain tenants for damage to or theft of its property." (Br. for Warner Holding Co., No. 793, Oct. T. 1945, p. 36, quoting 60 F. Supp. 513, 520.) This Court's opinion answered the trial court's question: "Could this court, without a jury, adjudicate the amount of restitution in each of the twenty rental units involved here, some of which have had several different tenants, without the tenants before it and without the defendant having an opportunity to interpose valid counterclaims as a defense?" (*Id.*) This Court held that a court of equity did have the power to adjudicate the counterclaims and to bring the tenants before it for that purpose.

[48] Exx. App. at 250a.

situated, to prove their individual injuries in order that they may be compensated, cannot be reconciled with those teachings. Indeed, as the District Court recognized, adoption of the petitioners' position would, as a practical matter, nullify the restitutionary remedy "because DOE [or a court] could never accurately determine the losses suffered by any one claimant." (Exx. App. at 253a.)

The decision below is also entirely consistent with *Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U.S. 577 (1949). While *Interstate* directed the federal court to make a "prognostication" as to what would in fact have happened as a consequence of federal or State law if the stay had not been issued (*id.* at 584), it was evidently anticipated that this task could readily be accomplished:

> Distribution of the fund should not involve prolonged litigation. It is an administrative matter involving the exercise of an informed judgment by the federal court and should have the flexibility and dispatch which characterize the administrative process. [*Id.*]

Here, by contrast, the courts below have found that allocating the fund among the potential individual claimants is "impossible." (Exx. App. 86a-91a, 247a-151a).[49]

Surprisingly, since this Court does not sit to resolve intracircuit conflicts, petitioners attempt to make much of a supposed inconsistency between the decision below

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[49] Some petitioners place particular reliance on a portion of Justice Frankfurter's separate concurring opinion. In so doing, they omit the concluding sentence of the paragraph from which they quote: "It will be time enough to distribute the fund by some makeshift rule of thumb if what is concededly a rule of intrinsic fairness should be found judicially unenforceable." (336 U.S. at 590). Justice Frankfurter recognized that even a "makeshift rule of thumb" would be preferable to imposing upon the lower court a duty which it could not perform; here, no "makeshift" rule was needed since there existed a model well grounded in Congressional and administrative example.

and that in *Citronelle-Mobile Gathering, supra.* In so doing, petitioners simply disregard TECA's careful and detailed explanation (Exx. App. 85a-87a) of why "the District Court's judgment and Order . . . are fully in accord with our ruling in *Citronelle* . . . ." (*Id.* 85a).

II. NONE OF THE PETITIONS PRESENTS A PROCEDURAL ISSUE WARRANTING REVIEW

Petitioners present an array of procedural objections to the District Court's decision, invoking variously Rules 24 (intervention) and 56 (summary judgment) of the Federal Rules of Civil Procedure and the Due Process Clause of the Fifth Amendment. Their common objection, whatever the form of their individual arguments, is that the District Court should have granted them a hearing on the issue of remedy. A close examination of the proceedings below and of the respective petitions shows that none of the petitioners present a procedural issue meriting review.

A. At the outset, it is essential to recall that most of the parties that are now petitioners here sought leave from the court to intervene *only for the purposes of appeal.* This was true of all the parties who moved to intervene after the court issued its decision—specifically three of the refiners who petition in No. 85-430 (Marathon, Mobil and Murphy); all parties to the ATA petition (No. 84-432) except the Gasoline Retailers (specifically ATA, Petroleum Marketers and Jobbers); as well as PECO (No. 85-440); and all parties to the National Freight petition (No. 85-444) (National Freight, RJG Cab and Sweeney). These parties did not move the District Court for leave to adduce any evidence to refute any of the findings which the court had made or otherwise to reconsider its decision. In short, since the District Court granted the postjudgment movants all the intervention which they sought, they cannot now assert that the court denied them any procedural rights.

B. This leaves to be considered only the procedural objections of the prejudgment (but post-oral argument) movants, the Indicated Refiners and the Gasoline Retailers.

1. Four of the refiners who were parties to the Indicated Refiners' prejudgment motion to intervene have joined in the Marathon petition;[50] that petition raises two related procedural issues. (Mar. Pet. i).

The first is that the District Court should have given notice and an opportunity to be heard to all potential claimants. That issue is insubstantial. The court could not possibly provide notice or an opportunity to be heard to all such persons, which include not only the present intervenors, but all others similarly situated, including, for example, 187,000 gasoline retailers and tens of millions of individual motorists. The refiners have asserted that *they* were injured and were unable to pass through all of the overcharges, but not that other persons such as consumers bore none of the burden. Moreover, as the refiners recognize, TECA ruled that such notice was unnecessary "on the theory that actual overcharges are incapable of judicial proof." (Mar. Pet. 20). They now contend—and this is the second part of the question which they present—that "that 'finding' is pure speculation." (*Id.*).

As shown above, however, the District Court's finding was fully substantiated in the Court's analysis of the regulatory framework and the particular record before it, the issue having been pressed by Exxon. Even more important for present purposes, the refiners cannot ask this Court to review that finding because, far from proffering any contrary evidence, they conceded the impossibility of tracing the overcharges below. In the District Court the Indicated Refiners asserted that "it is impossible to trace the impact of the overcharges directly to

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[50] They are Ashland, Pennzoil, Tenneco and Tosco.

any subsequent purchasers." (XLV R. 38973). Before TECA, the other refiners who here join in the Marathon petition asserted that with respect to both controlled and uncontrolled petroleum products that it would be impossible to determine whether or not the refiners absorbed or passed on the overcharges.[51]

The refiners so argued because their position in the courts below was that the rule in antitrust damage suits under *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968) and *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977) should be applied by analogy. They argued that in providing a remedy under § 209, the District Court was bound to award restitution to the first purchaser without regard to actual injury, as TECA had done in certain circumstances in private § 210 damage suits. TECA rejected that restrictive view of § 209 (Exx. App. 90a) and the question presented in the Marathon petition does not challenge this basis for denying the refiners' claim. That is, of course, a separate and independent ground for denying the refiners' petition.[52]

2. The Gasoline Retailers present no question or argument relating to the fact that their motion to intervene

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[51] Brief of Intervenor-Appellants Marathon Petroleum Company, *et al.*, at 16-17. This statement by Marathon, *et al.* and that of another refiner which is not a petitioner here were cited by TECA in making the very ruling which the refiners now challenge. *See* Exx. App. 90a, quoted at p. 11, *supra*.

[52] In the closing footnote of their petition, the refiners say that, if the lower courts had applied the principles of the above-cited decisions, "*the impossibility of proving the absorption or pass on of overcharges in transactions subsequent to the first purchases* would have required the entire restitutionary award to be made to the first purchaser unless a showing was made that a subsequent purchaser had a fixed quantity cost plus contract or its functional equivalent." (Mar. Pet. 24, n.21, emphasis added). The underscored passage is consistent with the refiners' position below, but cannot be reconciled with the theory of their petition—that they are entitled to a hearing on whether it is "impossible".

was filed prior to the District Court's judgment.[53] Rather, their petition makes a more general point, applicable to all the parties which join therein, that, because the District Court had granted them intervention as a matter or right under Rule 24(a), it violated that Rule by denying them the opportunity to present evidence of their injury. ATA Pet. i, first question; 18-21.[54] This contention is a *non sequitur*, for Rule 24(a) contains within it the requirement that the motion to intervene as of right be "timely".

Here, all the motions which sought intervention for the *purpose of appeal* were timely for that purpose and were granted. On the other hand, neither the motion of the Gasoline Retailers nor that of the Indicated Refiners, which were filed prior to judgment but after oral argument on DOE and Exxon's motions for summary judgment, were timely for the purpose of requiring the District Court to reopen its proceedings. The indisputable fact is that from the very outset of this case it has been clear that the United States was seeking restitution in the form of a payment into the United States Treasury. (*See* Complaint quoted at p. 5, n. 15, *supra*). The movants did not suggest in the District Court—nor do they

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[53] The Retailers' motion to intervene was originally denied by the District Court on the basis of its finding that the real victims of the overcharges were the ultimate *consumers* of petroleum products. (Exx. App. 249a, n.56). It is significant that the petition for certiorari in which they joined contains nothing to show that any retailer can demonstrate injury as a result of Exxon's overcharges.

[54] The parties to the ATA petition other than the Gasoline Retailers cannot maintain that contention for the additional reason that they moved to intervene only for the purposes of appeal. They are thus making the unsupportable assertion that the District Court erred by denying them that for which they did not ask. Likewise, since *none* of the petitioners opposed the granting of summary judgment, in accordance with the procedures of Rule 56 or otherwise, the argument in the ATA petition, pp. 21-23, that their rights under Rule 56 were infringed is also untenable.

demonstrate now—that they had a right to wait until the proceedings before the District Court were virtually complete before seeking to make a record on their claims.

The position urged in the ATA petition would lead to the absurd result that, where intervention is as of right, intervention may not be granted for purposes of appeal only. This Court has, however, approved intervention for purposes of appeal only, stressing that the propriety of such an appeal depends on "whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment." *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385. 395-396 (1977). *Cf. NAACP* v. *New York*, 413 U.S. 345, 366 (1973). In *McDonald*, intervention had been allowed under Rule 24(b), *see id.* at 390, but the Court there cited with approval a series of court of appeals decisions which allowed intervention for purposes of appeal only under Rule 24(a). (*Id.* at 395-396, n.16).[55]

No distinction between Rules 24(a) and (b) for this purpose has been proffered in the ATA petition, or readily suggests itself. If petitioners' submission were correct, a party whose interest is sufficient to allow intervention as of right and is timely for purpose of appeal could not be granted such intervention without being allowed to reopen the case in the trial court, even if its intervention is untimely for that purpose. Any such result would either defeat the right to intervene for purposes of appeal only or undermine the timeliness requirement of Rule 24(a).

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[55] These cases are: *Hodgson* v. *United Mine Workers*, 153 U.S. App. D.C. 407, 419, 473 F.2d 118, 129 (1972); *Smuck* v. *Hobson*, 132 U.S. App. D.C. 372, 378-379, 408 F.2d 175, 181-182 (1969); *Pellegrino* v. *Nesbit*, 203 F.2d 463, 465-466 (9th Cir. 1953); *Wolpe* v. *Poretsky*, 70 U.S. App. D.C. 141, 144, 144 F.2d 505, 508, *cert. denied*, 323 U.S. 777 (1944). The reports of the other cited cases do not state whether Rule 24(a) or (b) intervention was involved.

In sum, the prejudgment movants' procedural objections are no more worthy of review than those of the other petitioners, who intervened for purposes of appeal only.

CONCLUSION

For the foregoing reasons, the petitions for certiorari should be denied.

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December 23, 1985

(5) (4) (4) (3) (3)

Nos. 85-429, 85-430, 85-432, 85-440, and 85-444

In the Supreme Court of the United States

Supreme Court, U.S.
FILED
DEC 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

OCTOBER TERM, 1985

EXXON CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

MARATHON PETROLEUM COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

AIR TRANSPORT ASSOCIATION OF AMERICA, ET AL, PETITIONERS

v.

EXXON CORPORATION AND UNITED STATES OF AMERICA

PHILADELPHIA ELECTRIC CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

NATIONAL FREIGHT, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether crude oil price control regulations in effect between 1973 and 1981 required petitioner Exxon Corporation to calculate the amount of "new oil" at its Hawkins Field Unit by reference to the additional oil actually produced in the unit as a whole rather than by reference to production that Exxon shifted from one lease to another within the unit (No. 85-429).

2. Whether the regulations impermissibly discriminated between units formed at different times (No. 85-429).

3. Whether Exxon's suggested effective date for calculating new oil on a unit-wide basis was unreasonable as a matter of law (No. 85-429).

4. Whether Exxon was properly held liable for all of the crude oil overcharges that it caused (No. 85-429).

5. Whether the district court abused its discretion in ordering the restitution of crude oil overcharges through the States (Nos. 85-430, 85-432, 85-440, and 85-444).

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App.[1] 1a-172a) is reported at 773 F.2d 1240. The opinion of the district court (Pet. App. 173a-268a) is reported at 561 F.Supp. 816.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1985, and petitions for rehearing were denied on August 15, 1985 (Pet. App. 269a-270a). The petitions for a writ of certiorari in Nos. 85-429 and 85-440 were filed on September 13, 1985. The petitions for a writ of certiorari in Nos. 85-430, 85-432, and 85-444 were filed on September 14, 1985. The jurisdiction of this Court is invoked under Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed.) 1904 note, as incorporated by Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 633.

STATEMENT

1. *Regulatory background. a.* In 1973, a predecessor agency to the Department of Energy (DOE)[2] promulgated Phase IV price controls for domestic crude oil pursuant to the Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed.) 1904 note. See 6 C.F.R. Pt. 150, Subpt. L (1974), 38 Fed. Reg. 22536, 22538-22543 (1973); see also 10 C.F.R. Pt. 212, Subpt. D (1975), 39 Fed. Reg. 1924, 1952 (1974) (regulations as repromulgated under the

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[1] "Pet." and "Pet. App." refer to the petition and appendix in No. 85-429.

[2] Hereafter, we will use DOE to refer to its predecessor agencies as well as to the Department itself. The various agencies are set forth in *Pennzoil Co.* v. *DOE*, 680 F.2d 156, 161 & n.6 (Temp. Emer. Ct. App. 1982), cert. dismissed, 459 U.S. 1190 (1983). See Pet. App. 8a n.4, 173a n.1.

Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.*). These controls instituted a two-tier pricing mechanism designed to dampen the inflationary spiral in crude oil prices without eliminating economic incentives for increasing domestic production. See Pet. App. 9a, 175a, 206a.

The "primary statutory mandate [was] to hold down prices of crude oil" by setting a ceiling for the price of domestic oil which was already being produced, referred to as "old oil." Pet. App. 197a. Old oil was defined as the monthly production from a property that did not exceed the property's "base production control level" (BPCL), which was its production for the same month in 1972. Production in excess of the property's BPCL was deemed "new oil" that could be sold at prices above the controlled price for old oil, thus avoiding any disincentive for producers to discover new sources of oil and to increase the amounts of oil recovered from properties already in production. See *id.* at 9a, 196a; 6 C.F.R. 150.354 (1974), 38 Fed. Reg. at 22538; 10 C.F.R. 212.72 (1975), 39 Fed. Reg. at 1952.

Central to the two-tier system was the definition of the "property" for which the BPCL and current production were calculated. See 41 Fed. Reg. 4931, 4938 (1976). The regulations defined property as "the right which arises from a lease or from a fee interest to produce domestic crude petroleum." 10 C.F.R. 212.72 (1975), 39 Fed. Reg. at 1952 (repromulgating 6 C.F.R. 150.354 (1974)).[3] Left to their own devices, producers might seek to " 'obtain higher prices by arranging production in such a way as to shift oil into the "new" category to the maximum extent possible.' " Pet. App. 197a (citation omitted). Accordingly, the defini-

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[3] In 1976, Section 212.72 was "grammatically altered" (Pet. App. 177a n.5) "without substantive change" (*id.* at 9a) to define property as "the right to produce domestic crude oil, which arises from a lease or from a fee interest." 41 Fed. Reg. at 4920.

tion of property in Section 212.72 was intended to be interpreted in light of DOE's " 'duty to reasonably inhibit gerrymandering of boundaries undertaken to avoid price controls.' " *Ibid.* (citation omitted).

b. This case arises out of DOE's interpretation of its definition of property, and hence its determination of the proper amount of new oil produced, with respect to unitized crude oil producing properties formed after 1972, the base year for computing the BPCL. Unitization is a "cooperative production process" for "large, multilease tracts which * * * [fomerly] operated as independent, competing properties." Pet. App. 177a. Under a "Unit Agreement," the "previously competing leaseholders * * * group their interests and form a single unit comprising all of the interests in the single reservoir of oil," which permits "enhanced recovery efforts [that] cause oil to flow underground across lease lines." *Id.* at 178a n.6. Following unitization, production from many wells is typically reduced or eliminated altogether while production from other wells within the unit is substantially increased. *Id.* at 15a, 178a n.6; 40 Fed. Reg. 40832 (1975).

DOE consistently interpreted the definition of property in Section 212.72 to require that the amount of new oil produced at units formed after 1972 be determined on a unit-wide basis, *i.e.*, by comparing the current monthly production from the unit with a BPCL consisting of the total amount produced during the same month in 1972 from all of the leases comprising the unit. See Pet. App. 10a; *Pennzoil Co.* v. *DOE*, 608 F.2d 156, 162-163 & n.11 (Temp. Emer. Ct. App. 1982), cert. dismissed, 459 U.S. 1190 (1983).[4] The agency published this position in Ruling 1975-15, 40 Fed. Reg. 40832 (1975), where it stated that a unit's "BPCL is the total 1972 monthly production from

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[4] Certain of these interpretations, Nos. 1974-22, 1975-2, 1975-4, 1975-10, and 1975-27, were later published at 42 Fed. Reg. 23723, 23726, 23730, 23740, 25659 (1977). See Pet. App. 10a, 178a n.7.

all of the several leases that now comprise the unit." This approach was "dictated * * * by the need to compare like quantities, [during and after] 1972, in order to ensure a meaningful application of the new [oil]" provisions. *Ibid.* Otherwise, the "distorted actual production from any one lease comprising the unit" (*ibid.*; emphasis omitted) resulting from the shifts in production that normally accompany unit-wide production would allow producers to take advantage of the higher prices permitted for new oil far beyond the actual increase, if any, in their production of oil. As DOE explained, "the bulk of the actual production from the unit may be concentrated from only a few producing wells located on fewer than all of the several leases that comprise the unit, and lease-by-lease comparisons would yield no meaningful results in terms of measuring actual increases in production from those leases since the base period." 41 Fed. Reg. 4931, 4937 (1976). For these reasons, the agency concluded that "the unit agreement signifies one right to produce crude oil" and that "the unit [therefore] defines the property" under Section 212.72 of the regulations. 40 Fed. Reg. at 40832. See Pet. App. 10a, 177a-179a.

c. In December 1975, Congress enacted the Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 *et seq.*, in light of changes in the condition of the nation's oil supplies. The statute permitted for the first time "price increases, without current increases in production, when the agency found that such price increases would give incentives for 'enhanced recovery techniques.' " Pet. App. 10; see *id.* at 179a-180a.[5] In response to the new statute and industry comments, in February 1976 DOE promulgated a new regulation effective prospectively from

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[5] Absent such circumstances, Congress specifically prohibited regulatory changes permitting "an increase in the price for any volume of old crude oil production." 15 U.S.C. 757(b)(2). See Pet. App. 179a-180a.

February 1, 1976, 10 C.F.R. 212.75 (1977), 41 Fed. Reg. at 4941. Section 212.75 provided that a "producer shall, as of the date of implementation of enhanced recovery operations on a unit or as of the date production patterns with respect to individual leases within a unit are substantially altered (whichever date occurs first), establish a unit base production control level for the unit." Before that time, meaningful lease-by-lease comparisons would still be possible, and delaying implementation of the unit-wide BPCL would remove certain "disincentive[s] to the *prospective* unitization of properties." 41 Fed. Reg. at 4938 (emphasis added); see also *id.* at 4936-4937. The regulation defined "enhanced recovery" as "any method * * * of recovering crude oil in which part of the energy employed to move the crude oil through the reservoir is applied from extraneous sources by the injection of liquids or gases into the reservoir." [6]

DOE also applied its more lenient approach toward unitized properties to existing units subject to Section 212.72 by rescinding ab initio "[t]hat limited portion of [Ruling 1975-15] which require[d] the producer *as of the effective date of unitization* to total all the BPCL's of participating leases and to treat the unit as a single property." 41 Fed. Reg. at 4937 (emphasis added). The agency reaffirmed the basic principle of Ruling 1975-15, embodied in 6 C.F.R. 212.72 (1975), that unitization normally requires unit-wide production comparisons in order to determine the true incremental increase in oil production; it concluded, however, that calculation of a unit-wide BPCL need not in every instance take place immediately upon unitization. 41 Fed. Reg. at 4937. Rather, DOE deter-

[6] The agency "ma[de] it clear" that its definition of enhanced recovery "would apply * * * so long as the '*energy employed* to move the crude oil through the reservoir is applied from extraneous sources.' The fact that the injected fluids or gases may have originated in the reservoir is irrelevant as long as they are injected by an extraneous energy source." 41 Fed. Reg. at 4938 (emphasis in original).

mined that a unit-wide BPCL need be implemented only after "there has been a significant alteration in pre-unitized producing patterns of the individual leases" or "enhanced recovery operations [have begun]." *Ibid.*; see generally Pet. App. 11a-12a, 180a-181a. The agency stated that at a later time it would further clarify the standard of a significant alteration in production patterns beyond its extensive reference in the preamble to the necessity for adopting a unit-wide BPCL where a meaningful comparison of pre- and post-base level production would not be possible on a lease-by-lease basis. 41 Fed. Reg. at 4937; see also 41 Fed. Reg. 36172, 36181 (1976). See generally Pet. App. 10a-12a, 180a-182a.

d. After receiving comments on the issue, DOE amended Section 212.75 in August 1976 to define "significant alteration in producing patterns" as "the occurrence of either (1) the application of extraneous energy sources by the injection of liquids or gases into the reservoir, or (2) the increase of production allowables [*i.e.*, maximum permitted production levels] for any property that constitutes the unitized property." 41 Fed. Reg. 36172, 36184. Once either of these events occurred, the BPCL was required to be calculated on a unit-wide basis. *Ibid.* At the same time, the agency further amended Section 212.75 "to eliminate any remaining disincentive to producers of new crude oil to enter unitized properties" by granting them the benefit of "imputed new oil," which ensured that newly formed units would be permitted to sell at least as much new oil as they had produced before unitization. 41 Fed. Reg. at 36182; see *id.* at 36184. See generally Pet. App. 12a, 182a.

e. In response to further comments, the agency clarified its amended Section 212.75 in Ruling 1977-2, issued in January 1977. 42 Fed. Reg. 4409. This ruling made clear that "Section 212.75, adopted on February 1, 1976, is applicable only to enhanced recovery unitized properties which established a unit BPCL on or after February 1,

1976." *Id.* at 4415. Units formed prior to that date, by contrast, were governed by Section 212.72, as reflected in Ruling 1975-15 (as modified on February 1, 1976). *Ibid.* The later definition of "significant alteration in producing patterns" promulgated in August 1976 would "be considered as guidance" with respect to determining the date on which a unit BPCL would be required for these earlier-formed units. *Ibid.* Producers would be permitted to attempt "to justify the establishment of the date of significant alteration in producing patterns" on other reasonable grounds "on a case-by-case basis." *Ibid.* DOE also explained that the special incentive of "imputed new oil" provided in the amendment to Section 212.75 effective September 1, 1976, was available only for units undergoing a significant alteration on or after that date. 42 Fed. Reg. at 4414. See Pet. App. 12a, 182a-183a.

2. *Factual background.* a. Oil was discovered in the Hawkins Field in Texas in 1940. Within a decade, more than 200 companies and individuals were producing oil on more than 300 leases in the field; by 1969, petitioner Exxon Corporation[7] owned two-thirds of the field's production. The Texas Railroad Commission regulated the competitive production of oil from Hawkins Field by setting "production allowables" limiting the amount of oil that could be produced from each well. The Commission also established a "maximum efficient rate of production" (MER), which limited the volume of oil that could be pumped from the field as a whole each day. Under the Commission's MER rules, any shortfall in a lease's daily production under its allowable was distributed pro rata to all of the other capable leases in the field in order to allow total production to remain at the MER level. Pet. App. 14a-15a, 183-184a.

Several years before the promulgation of crude oil price

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[7] Unless otherwise stated, we will use "petitioner" to refer to Exxon Corporation.

control regulations, petitioner and other owners of interests in Hawkins Field recognized the need to initiate enhanced recovery operations in order to arrest the decline in natural reservoir pressure that had occurred over the years and thereby to prolong the life of the field. In 1969, petitioner began to promote unitization of the field, which would spread the cost of recovery operations and permit the use of techniques that would move oil across lease lines. In preparation for unitization, the Commission authorized petitioner in 1969 to conduct a limited interim gas injection project and significantly increased the field's daily MER allowable. Pet. App. 15a-16a, 184a-185a.

During the extensive negotiations leading to a unit agreement, petitioner projected a net after-tax profit for the interest owners resulting from unitization of more than $250 million. This figure was based on an oil price substantially below the price at which *old* oil eventually sold under price controls. The unit agreement, ultimately signed in 1974, provided that petitioner would operate the unit beginning on January 1, 1975. Pet. App. 16a, 185a; R. 23881-23882, 24057, 24128-24130.

b. Following the promulgation of price controls in 1973, petitioner issued instructions to its employees requiring that each of its multi-lease units, including those (like Hawkins Field) formed after 1972, must be treated as a single property for price regulation purposes, and petitioner in fact followed those instructions at other post-1972 units. Pet. App. 16a-17a, 186a-187a. In July 1974 petitioner informed other Hawkins Field interest owners that, "[a]fter unitization, the field is treated as a single lease and exempt [*i.e.*, new] oil is calculated on a total field basis." R. 24366. As petitioner explained, this would result in "much less exempted oil volume than under nonunit operation." R. 24375; see also R. 24379, 24385. Notwithstanding the smaller amount of new oil that would be available under the unit price rule, 98.5% of

the working interest owners in Hawkins Field and 82% of its royalty interest owners had signed the unit agreement as of early August 1974. R. 24411; see also R. 18013-18014.

c. Shortly before unitization became effective, however, petitioner decided to depart from its prior representations to the Hawkins Field interest owners and from its pricing practices at other unitized fields by announcing that it would continue lease-by-lease accounting at Hawkins Field following unitization. Pet. App. 17a, 187a-188a. Once unitization began, petitioner was permitted by the state regulatory agency "to transfer production among wells within the unit, *at will.*" *Id.* at 16a (emphasis in original). Petitioner immediately took advantage of this new flexibility by shutting in more than 20% of the unit's wells, which enabled it to reduce production at 137 leases by nearly 320,000 barrels and to increase production by an equal amount at 65 other leases. *Id.* at 46a. Petitioner also substantially increased the volume of gas that it injected into the field. *Id.* at 49a-50a, 230a-231a.

In light of petitioner's continued lease-by-lease accounting following unitization, its transfer of production among leases "resulted in substantial increases in 'new' oil, without any actual increase in total production from the field." Pet. App. 46a. Petitioner "doggedly persisted, even in the face of the pellucid dictates of Ruling 1975-15, in applying individual lease accounting at the Hawkins Field." *Id.* at 234a (footnote omitted). It did not adopt a unit-wide BPCL until September 1, 1976. When it did so, petitioner performed its calculations under the more generous provisions of Section 212.75 of the regulations rather than under Section 212.72, even though the agency consistently had determined—and made explicit in January 1977—that Section 212.75 did not apply to units such as Hawkins Field that were formed prior to February 1976. Pet. App. 18a, 190a. Petitioner continued accounting on this basis until decontrol in 1981. Despite a "steady

decline in production" at Hawkins Field during the period that controls were in effect, petitioner's pricing practices ensured that "an *increasing* percentage of oil was accounted for by [petitioner] as upper-tier, higher-priced oil, until beginning June 1, 1979, almost all of the [production] was classified as new oil." *Id.* at 190a (emphasis added).

3. *Proceedings below.* a. The United States filed this action in the United States District Court for the District of Columbia, seeking restitution from petitioner of the overcharges that it caused by improperly computing the amount of new oil produced at Hawkins Field.[8] On cross-motions for summary judgment, the district court denied petitioner's motion and granted the government's motion to require restitution of all overcharges with interest. Pet. App. 173a-268a. The district court held that Section 212.72 of the regulations required the adoption of a unit-wide BPCL immediately upon unitization and that petitioner suffered no prejudice from application of the less stringent "significant alteration" test as "guidance" for determining the date at which calculation of such a BPCL was required. *Id.* at 206a-210a, 213a-214a. The district court rejected petitioner's contention that the government was estopped from enforcing its regulations, noting that "a regulated party as sophisticated as [petitioner]" could not reasonably "ignore[ ] the only existing official pronouncements" in favor of "unauthorized views of agency employees ferretted out by [petitioner] which happen to coincide with [its] self-interest." *Id.* at 234a.

The district court also determined that DOE's "sliding scale of incentives, though complex, reasonably carried

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[8] The government also sought civil penalties. The district court declined to assess a penalty, noting that while petitioner "ignor[ed] the unequivocal dictates" of the regulations, it "accurately represented its conduct to the agency." Pet. App. 260a. The government did not prosecute an appeal from this ruling. *Id.* at 5a.

out the conflicting objectives" of holding down prices while increasing production. Pet. App. 220a n.37. Accordingly, the agency did not act improperly in offering special benefits, such as imputed new oil, to producers that, unlike petitioner, had not found unitization economically attractive without those benefits. *Id.* at 214a-221a. "In refusing to go further and to extend greater benefits to pre-existing units" such as Hawkins Field, the district court reasoned, "the agency performed precisely the delicate weighing of competing statutory objectives with which Congress had entrusted it and to which judicial deference is due." *Id.* at 220a. The district court also noted the "puzzling" nature of petitioner's attacks on Section 212.75, since even if that regulation were invalidated, Section 212.72, which set forth the definition of "property," nonetheless required implementation of a unit BPCL at Hawkins Field as of January 1, 1975. Pet. App. 227a n.39.

Giving petitioner the benefit of the relaxed requirement of Ruling 1977-2, and applying as guidance the definition in Section 212.75, the district court ruled that a unit BPCL was required under that definition as well on January 1, 1975, because a "significant alteration in producing patterns" occurred as of that date. Pet. App. 221a-231a. The district court reached this result in view of the increased injections of gas, increases in production allowables, and substantial transfer of production among leases that occurred simultaneously with unitization. The district court also concluded that, as a matter of law, petitioner had not offered any basis for the choice of a reasonable alternative date on which to begin unit-wide accounting. *Id.* at 226a-227a n.38.[9] Petitioner's reliance on the testimony of

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[9] The district court addressed this issue even though petitioner had not actually contended that its evidence established a reasonable alternative date within the definition set forth in the regulations and the question therefore was "not before the court." Pet. App. 226a n.38; see also *id.* at 52a-53a & n.26.

petroleum engineers with respect to the underground drive mechanism of the Hawkins Field reservoir would be unworkable, the district court found, because it would substitute "hard to decipher underground phenomena" for the "clear, easily administered test" adopted by DOE. *Id.* at 222a.

Finally, the district court held petitioner liable for the full amount of the overcharges from Hawkins Field because petitioner had caused those violations of the law by its pricing and production decisions as operator of the unit. Pet. App. 239a-259a. In light of the impossibility of identifying the ultimate victims of petitioner's actions, the district court exercised its equitable powers to order the funds to be deposited in an escrow account for distribution to the states in connection with specified energy conservation programs. *Id.* at 255a-256a.[10]

b. The court of appeals affirmed. Pet. App. 1a-172a.[11] Relying on its decision in *Pennzoil Co.* v. *DOE, supra,* the court of appeals held that Section 212.72 "required the establishment of a single BPCL upon unitization of the Hawkins Field." Pet. App. 29a. It further noted that Ruling 1975-15, which made this interpretation explicit, was later only partially rescinded and that the agency's focus remained on "the fact that lease-by-lease accounting was not permissible after some alteration in production methods precluded any 'meaningful comparison' of current and base period production." *Id.* at 30a.

The court of appeals agreed with the district court that, even under the relaxed application of Section 212.72 and

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[10] In view of the fact that the judgment was only a small fraction of petitioner's net worth, the district court relieved petitioner of the requirement that it post a bond pending appeal. See R. 31664.

[11] The panel was unanimous with respect to petitioner's liability. Judge Becker dissented in part solely on the ground that persons claiming to be actual victims of petitioner's overcharges should have been afforded an opportunity to prove the fact and amount of their damages. Pet. App. 93a-172a.

the significant alteration test, petitioner was required to adopt a unit BPCL for Hawkins Field as of January 1, 1975. *Id.* at 30a-39a, 43a-51a. The court of appeals rejected petitioner's contention that Hawkins Field never would have been unitized had the owners known that a unit BPCL was required, noting that petitioner "was well aware that Section 212.72 required adoption of unit-wide accounting upon unitization." *Id.* at 40a.[12] The court of appeals also concluded that the special benefits for prospective unitization provided in Section 212.75 were not arbitrary. *Id.* at 41a-43a.

The court of appeals rejected petitioner's argument that it had established a reasonable alternative basis for unit-wide accounting for two reasons. First, "any meaningful comparison of production levels between 'old' and 'new' oil on a lease-by-lease basis became impossible once production across lease lines began in January, 1975." Pet. App. 53a. Second, "any resort to the testimony of expert petroleum engineers * * * would be unworkable, and therefore, not a reasonable basis for determination of the question." *Id.* at 54a-55a.

Relying on its decision in *Sauder* v. *DOE,* 648 F.2d 1341 (Temp. Emer. Ct. App. 1981), the court of appeals agreed with the district court that petitioner was liable for all of the overcharges from the unit because "[t]he undisputed evidence" (Pet. App. 57a) demonstrated that petitioner caused those overcharges. *Id.* at 55a-61a. The court of appeals also held that the district court had properly exercised its equitable discretion in requiring petitioner to pay the full amount of the overcharges in view of petitioner's failure to follow the clear commands of the regulations. *Id.* at 76a-77a. Finally, the court of appeals upheld the

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[12] Unitization was attractive even under the unit BPCL requirement because it made possible the production of more oil for the unit as a whole than if the owners had continued competitive production and lease-by-lease accounting. See Pet. App. 40a; see also Pet. 2.

district court's order concerning disposition of the judgment. *Id.* at 78a-92a; see note 11, *supra*.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The Temporary Emergency Court of Appeals decided a narrow issue of regulatory construction under a program of emergency price controls that has long since expired and is of no continuing importance. As this Court has noted, Congress established TECA in order to ensure expert and uniform treatment of energy issues, and it is "a court intimately familiar with the intricacies of federal energy regulation." *Tully* v. *Mobil Oil Corp.*, 455 U.S. 245, 248 (1982). TECA carefully considered the arguments presented in the petitions, and it rejected them in a thoughtful decision.[13] In these circumstances, further

[13] Petitioner Exxon's renewal (Pet. 27 n.24) of its prior attack (84-1142 Pet. 9-11) on the integrity and impartiality of the judges designated by the Chief Justice to serve on TECA is unwarranted and disrespectful of the judges who devote their time and energy to serving on that court. Petitioner's specious and impertinent claim that TECA's supposed partiality is "widely recognized" is not corroborated by the references on which it relies. Moreover, petitioner fails to support the implication of its allusion to the government's success in cases before TECA—*i.e.*, that those cases were wrongly decided. Rather, the outcome of cases in TECA reflects the insubstantial nature of many of the arguments raised in opposition to DOE positions, something further illustrated by Exxon's petition in this case. We note that our own informal survey indicates that the other courts of appeals have decided approximately 90% of appeals relating to the Emergency Petroleum Allocation Act on the merits in favor of the government. Finally, petitioner's characterization of TECA's treatment of the applicability of *INS* v. *Chadha*, 462 U.S. 919 (1983), to the price control program as "cavalier[]" (Pet. 39 n.33) is disingenuous at best. As petitioner well knows, that issue had already been conclusively decided against it by TECA in the court of appeals' comprehensive opinion in *Exxon Corp.* v. *DOE*, 744 F.2d 98 (1984), cert. denied, No. 84-188 (Dec. 3, 1984), and it therefore warranted little discussion here.

review is not warranted.[14]

1. Petitioner argues first (Pet. 27-29, 29-32)[15] that the regulations did not require it to adopt a unit-wide BPCL for Hawkins Field as of January 1, 1975. This argument is completely without merit.

a. The definition of property contained in Section 212.72 was promulgated by the agency in 1973. TECA has consistently held that that regulation, in itself, required the adoption of a unit BPCL immediately upon unitization. See *Pennzoil Co.* v. *DOE*, 680 F.2d 156, 168 (1982), cert. dismissed, 459 U.S. 1190 (1983); *Francis Oil & Gas, Inc.* v. *Exxon Corp.*, 687 F.2d 484, 488, cert. denied, 459 U.S. 1010 (1982); *DOE* v. *Louisiana*, 690 F.2d 180, 190 (1982), cert. denied, 460 U.S. 1069 (1983); *Grigsby* v. *DOE*, 585 F.2d 1069 (1978), cert. denied, 440 U.S. 908 (1979). As TECA explained in *Pennzoil* (680 F.2d at 168):

> "The focus of the 'property' definition is upon the 'right to produce,' not the fee or leasehold nature of the ownership interest." [Citation omitted.]

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[14] Contrary to its repeated suggestions (Pet. i, 1, 2, 25, 42), the mere monetary size of petitioner's violations does not entitle it to further review in the absence of a legal issue of sufficient general significance to warrant this Court's attention. We note also that the constitutional garb in which petitioner dresses what are at bottom mundane challenges to an agency's exercise of discretion and interpretation of its own regulations was donned fairly late in the day. In almost 200 pages of briefs in the court of appeals, petitioner mentioned due process only twice. Cf. Pet. 2, 25, 26, 29, 31 n.29, 32, 42. Not until its petition for rehearing did petitioner expressly make its primary argument in constitutional terms, and then only very briefly (at 25-26). Thus petitioner "continues to shift ground" in this Court just as it did below. Pet. App. 53a n.28; see *id.* at 32a. See generally, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

[15] Petitioner Exxon attacks only the finding of liability (questions 1-4). The petitioners in Nos. 85-430, 85-432, 85-440, and 85-444 support the finding of liability and seek review only of the question whether the district court abused its discretion in ordering that the judgment fund be distributed through the several States (question 5). These issues are completely independent.

> The application of this definition to unitized properties plainly contemplates a single "property" or right to produce arising from the several leases or fee interests constituting the unit.
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> [I]f upon unitization the "property" is no longer defined by each individual lease but by the unit as a single right to produce, it seems rather obvious that current production of the "property" after unitization must include all production from all of the leases within the unit.

Thus, even if DOE had done nothing further, Section 212.72 alone—which is how the regulations stood at the time that petitioner formed the unit and made its pricing decisions—required petitioner to adopt a unit BPCL for Hawkins Field on January 1, 1975. Pet. App. 38a.

Petitioner makes three responses.[16] First, it contends that the language of Section 212.72 required lease-by-lease accounting at unitized properties. Pet. 6, 27-28. This argument misreads the "plain language of the definition" and would in effect completely rewrite it. *Pennzoil,* 680 F.2d at 169; see *id.* at 168; Pet. App. 27a-29a. Moreover, it rests, like much of petitioner's argument (*e.g.*, Pet. 2, 9, 41), on an unreasonable and one-sided view that the overriding purpose of the price control regulations was to encourage production. As the courts below made clear, that goal was

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[16] All of these responses miss the point that petitioner's liability rested on its failure to satisfy the more lenient "significant alteration in production" standard of Ruling 1977-2 rather than the immediate unit-wide BPCL requirement of Ruling 1975-15. See Pet. App. 38a, 43a-51a. That petitioner was unable to qualify for the benefits provided by the more lenient standard is no reason to invalidate the agency's construction of its own regulations, which plainly were not intended to provide benefits to all units regardless of circumstances. Cf. *Placid Oil Co.* v. *FPC,* 483 F.2d 880, 905 (5th Cir. 1973), aff'd *sub. nom. Mobil Oil Co.* v. *FPC,* 417 U.S. 283 (1974).

only one of several and scarcely could be given controlling weight in disregard of the fundamental purpose of directly limiting the price increases that were plaguing the nation. See Pet. App. 9a, 175a, 197a, 206a.[17] Petitioner's reading of the regulation would utterly have failed to advance this purpose in a sensible fashion, for it would have allowed the creation on paper of new, higher-priced oil simply by shuffling production from one well to another without any actual increase in production. See pages 3-5, 10-11, *supra*. Indeed, it would have permitted crude oil producers to escape price controls altogether merely by joining forces with their neighbors and pumping all of their joint production out of one well rather than two. Finally, petitioner fails to give due deference to DOE's own interpretation, adopted in several contemporaneous rulings, that Section 212.72 required a unit BPCL immediately upon unitization, an interpretation faithful to the language of the regulation and to the underlying statutory and regulatory purposes. See, *e.g.*, Pet. App. 196a-197a; *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965) (citation omitted) (" '[T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.' ").[18]

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[17] One searches in vain through the 42-page petition for even an acknowledgement that one purpose of price controls was to control prices.

[18] The fact that several of the interpretations (unlike Ruling 1975-15) were not published in the Federal Register until 1977 (see note 4, *supra*) does not detract from their probative value in demonstrating the agency's view of what its own regulations required. Of course petitioner could not have been bound by unpublished rulings; the point, however, is that the validly promulgated and published regulation itself required the practice that petitioner refused to adopt. In view of both Ruling 1975-15 and the agency's other contemporaneous interpretations of Section 212.72 to require a unit BPCL immediately upon unitization, petitioner's characterization of this understanding of the regulation as a "later *post hoc* rationalization[] of the agency's litigation attorneys" (Pet. 28 n.26) is contrary to fact.

Second, petitioner appears to suggest (Pet. 28 n.27, 41), although it avoids directly invoking the doctrine, that the government should, in effect, be estopped from enforcing Section 212.72 on the basis of alleged informal oral advice by some agency employees that lease-by-lease accounting of unitized properties was permissible, an argument that petitioner waived in the court of appeals. See Pet. App. 77a-78a n.41. Consistently with this Court's rulings, TECA has repeatedly held, as it did here, that the views of individual officials could not reasonably be relied on as those of the agency and cannot estop the government from enforcing the law. See Pet. App. 33a-34a; *Christmann & Welborn* v. *DOE*, 773 F.2d 317 (1985), cert. denied, No. 85-81 (Oct. 15, 1985); *Pennzoil Co.* v. *DOE*, 680 F.2d at 171-172. See generally, *e.g.*, *Heckler* v. *Community Health Services*, No. 83-56 (May 21, 1984); *Schweiker* v. *Hansen*, 450 U.S. 785 (1981). In any event, it is quite plain that petitioner did not rely on such advice in embarking upon unitization at Hawkins Field, for petitioner obtained the agreement of the other interest owners on the assumption that unit-wide accounting would be required, and it followed that practice at its other units as well. See pages 9-10, *supra*.[19]

Third, petitioner argues that DOE's partial rescission of Ruling 1975-15 in February 1976 vitiates all reliance on the agency's interpretation of Section 212.72 to require unit-

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[19] Without pausing to acknowledge the findings of the courts below, petitioner baldly asserts that Hawkins Field never would have been unitized had the interest owners known that a unit BPCL was required. Pet. 5-6, 31. The court of appeals expressly rejected this speculation (Pet. App. 40a), and it defies common sense as well as the factual record. Petitioner and the other Hawkins Field interest owners were quite obviously far better off financially once the reservoir was unitized even with the unit BPCL required by Section 212.72 because unitization allowed the production of substantially greater quantities of oil than would otherwise have been possible. See Pet. App. 15a, 40a-41a, 208a-209a n.30.

wide BPCLs. Pet. 27-29. In making this argument, petitioner completely misconstrues DOE's February 1976 ruling. The agency reaffirmed the principle of Section 212.72 and Ruling 1975-15 that unitization normally requires the adoption of a unit BPCL because lease-by-lease comparisons of production are no longer meaningful. 41 Fed. Reg. 4931, 4937 (1976). However, because it recognized that production patterns are not in every case realigned simultaneously with unitization, the agency relaxed the requirement that producers adopt a unit BPCL immediately upon unitization in favor of the "significant alteration in producing patterns" standard, which both was more sensitive to the changes that necessitated adoption of a unit BPCL and increased the incentives for unitization. See Pet. App. 30a-31. The result was a less stringent application of Section 212.72. But the agency most emphatically did not establish the propriety of the lease-by-lease accounting practices followed by petitioner, which resulted in increasing amounts of new oil being reported even as actual production declined. *Id.* at 190a.[20]

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[20] The agency made this clear at the time (41 Fed. Reg. at 4937):

> [I]n determining quantities of new * * * crude oil from a unit under the prior regulations, Ruling 1975-15 required that current total production from the unit exceed the total base production control levels for all the participating properties of the unit before any of the unit production qualifies as new crude oil.
>
> This result is dictated by the need to compare current production levels with like quantities of base production control levels in determining whether there has been an increase in production above base period levels. * * * [A] meaningful comparison could not ordinarily be obtained where current production figures from individual leases are compared with BPCL's from those leases, once there has been a realignment of producing patterns such as normally accompanies enhanced recovery. Thereafter, the bulk of the actual production from the unit may be concentrated from only a few producing wells located on fewer than all of the several leases that comprise the unit, and lease-by-lease comparisons would yield no meaningful results in terms of measuring actual

b. Petitioner argues as well (Pet. 29-31) that the new standard for determining the date for calculating new oil on a unit-wide basis embodied in the definition used in Section 212.75 could not be applied retroactively to Hawkins Field.[21] As both courts below noted, the argument is a curious one because invalidation of Section 212.75 would leave petitioner in no better position: it would still have been required to adopt a unit BPCL on January 1, 1975 under Section 212.72, as just discussed. Pet. App. 32a, 227a-228a n.39. In any event, retroactive application of the definition used in Section 212.75 is unobjectionable because it did not prejudice petitioner. Cf. *United States* v. *Caceres,* 440 U.S. 741, 752-753 & n.15 (1979); *American Farm Lines* v. *Black Ball Freight Serv-*

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increases in production.

> * * * [U]ntil such time as there has been a significant change in producing patterns, [however,] there is no reason for the unit operator to depart from the historical practice of determining quantities of new crude oil on a lease-by-lease basis.
>
> * * * Once enhanced recovery operations begin [or producing patterns are significantly altered before the actual implementation of enhanced recovery operations], the producer will be required to calculate a unitized BPCL * * *.

[21] Petitioner appears at times to suggest that even under the definition set forth in Section 212.75 or some ill-defined "generic standard," a significant change in producing patterns did not take place on January 1, 1975. See, *e.g.*, Pet. 23 n.21, 32 n.29. However, the record clearly establishes the extent to which petitioner shifted production among leases as of that date, thereby rendering meaningful lease-by-lease comparisons—the only possible "generic" touchstone—impossible. See page 10, *supra*. Moreover, it is undisputed that production allowables and gas injections increased, thereby triggering a unit BPCL requirement under the regulatory definition (contrary to petitioner's contention, the regulations did not require that the injected gas be obtained from sources outside the reservoir, see note 6, *supra*). It would, indeed, have been flatly inconsistent with the statutory purpose for the agency to have permitted the wholly illusory creation of higher-priced new oil for which petitioner argues. See Pet. App. 43a-51a (finding as a matter of law that a significant alteration of producing patterns occurred at Hawkins Field on January 1, 1975).

ice, 397 U.S. 532, 539 (1970); see generally *SEC* v. *Chenery Corp.,* 332 U.S. 194, 203 (1947). Ruling 1977-2, using the definition in the new Section 212.75, was more favorable to producers than Ruling 1975-15, which strictly applied the old Section 212.72. Moreover, in making its decision to unitize, petitioner relied only on the less favorable prior standard requiring the immediate adoption of a unit BPCL. Pet. App. 38a-41a; see pages 9-10, *supra.*

2. Petitioner argues next (Pet. 32-35) that the additional incentives for unitization provided by the regulations for units formed after February 1976 were irrational. The courts below thoroughly discussed and correctly rejected this contention. Pet. App. 41a-43a, 214a-221a. As the district court noted, petitioner merely "seeks to wage the battle it lost when Section 212.75 was promulgated." *Id.* at 220a. DOE "performed precisely the delicate weighing of competing statutory objectives with which Congress had entrusted it and to which judicial deference is due." *Ibid.* The differing incentives available to units that were formed at different times or not yet formed reasonably balanced the conflicting goals of increasing production and holding down prices by offering additional benefits only to those producers for whom unitization would not otherwise have been profitable. See *DOE* v. *Louisiana,* 690 F.2d at 189. The purpose of Section 212.75 was "to remove any * * * regulatory impediments to the *formation* of units." 41 Fed. Reg. 36172, 36182 (1976). Since it was unnecessary to encourage something already accomplished, it was completely reasonable not to apply the incentive provisions of Section 212.75 to pre-existing units such as Hawkins Field. TECA, which has special expertise in this area, found no basis for setting aside the agency's exercise of discretion. There is no basis (or need, given the fact that the regulations have expired) for this Court to do so either. See generally, *e.g., Capital Cities Cable, Inc.* v. *Crisp,* No. 82-1795 (June 18, 1984), slip op. 15; *Heckler* v.

Campbell, 461 U.S. 458, 466 (1983); *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974).[22]

3. Petitioner argues next (Pet. 35-38) that it was denied an opportunity to present a reasonable alternative basis for beginning unit-wide accounting at Hawkins Field. Apparently, petitioner relies on the testimony of "fourteen petroleum engineering experts" concerning the underground drive mechanism of the reservoir and concluding that the most significant change occurred with the injection of inert gas beginning in 1977. See Pet. 17 n.15. Petitioner's argument misses the point. Both courts below fully credited petitioner's evidence. They properly concluded, however, that there was no factual dispute to be decided because petitioner's proferred alternative date was unreasonable as a matter of law. Pet. App. 52a-55a, 226a-227a n.38. Accordingly, no factual hearing was required. See, *e.g.*, *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 620 (1973).[23]

The unreasonableness of petitioner's suggested date is apparent at once. Petitioner extensively realigned production patterns at Hawkins Field beginning on January 1, 1975. See page 10, *supra*; Pet. App. 46a, 228a-229a. As the district court explained, petitioner's "own measurements and analysis of production shifts at Hawkins Field show[ed] the dramatic changes that occurred in 1975," in-

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[22] In any event, as the courts below noted, petitioner's attack, if successful, would result only in the invalidation of certain of the benefits provided by Section 212.75, not the extension of those benefits to petitioner. Pet. App. 43a n.17, 219a n.35.

[23] Petitioner's grandiose invocation (Pet. 35-36) of the *Accardi* doctrine, *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), is irrelevant. Nothing in the agency's regulations provided that a completely meaningless factual hearing must be held where the producer's suggested alternative date fails as a matter of law. See also Fed. R. Civ. P. 56 (providing for summary judgment where there is no issue of material fact).

cluding a shift of "almost 20 percent of 1975 production * * * across lease lines, almost two and one-half times as much as had shifted in either 1974 or 1973." *Id.* at 229a-230a n.42. It was this substantial shift in production that allowed petitioner to claim most of its new oil even though total production from the field had not in fact increased, a result prohibited by the letter, and antithetical to the purposes, of the price control program. The agency had in fact repeatedly made crystal-clear that shifts such as those caused by petitioner at Hawkins Field rendered meaningful lease-by-lease comparisons impossible and therefore required the adoption of a unit BPCL. See, *e.g.*, *id.* at 53a; note 20, *supra.*

In short, petitioner's " 'realignment of the pattern of production would have played havoc with the federal pricing system had [the agency] permitted lease by lease property designations to continue in force after a unitization [because] [i]t would have resulted in the recognition of artificially high quantities of new oil from some of the participating leases while other leases would be producing less or not at all.' " Pet. App. 54a (citation omitted). The underground drive mechanism of the reservoir is thus irrelevant and, in any event, too complex and amorphous to be relied upon as a workable regulatory standard. *Id.* at 54a-55a, 226a n.38.

4. Petitioner lastly takes issue (Pet. 38-41) with the amount of the judgment. Petitioner's reliance on the supposed equities in its favor is, as the court of appeals observed, for the most part "simply a recasting of its unsuccessful claim * * * that the Government was estopped from challenging the legality of lease-by-lease accounting." Pet. App. 77a. Contrary to petitioner's argument, the courts below fully considered the relevant mitigating factors; indeed, the district court, after "careful consideration of the voluminous record," declined to assess civil penalties against petitioner. *Id.* at 259a-260a.

By the same token, however, the district court refused "to excuse [petitioner's] behavior." *Id.* at 260a. As the district court noted, petitioner's pricing practices "ignor[ed] [the] unequivocal dictates of the regulations" and departed from petitioner's own construction and application of the regulations at its other units. *Ibid.* The court of appeals adopted the findings of the district court in this regard, *id.* at 77a, and they plainly warrant no further review.[24]

Petitioner's argument that its liability should have been limited to its own production from Hawkins Field was correctly rejected by TECA (Pet. App. 55a-61a) on the basis of that court's prior precedents. Moreover, this Court has recently declined to review the identical contention in *Christmann & Welborn* v. *DOE,* 773 F.2d 317 (Temp. Emer. Ct. App. 1985), cert. denied, No. 85-81 (Oct. 15, 1985); see also *Sauder* v. *DOE,* 648 F.2d 1341, 1347-1349 (Temp. Emer. Ct. App. 1981). There is no reason for a different result here.

Petitioner, which owned approximately 80% of the working interest in Hawkins Field, was the moving force behind unitization and the dominant force after unitization. Its liability rests on the fact that petitioner "caused the overcharges" throughout the unit and is therefore "fully liable for all of them." Pet. App. 55a. As sole operator of the unit, petitioner made all production and pricing decisions (*id.* at 57a (quoting district court's opinion)):

"[Petitioner] chose the wells to shut-in, the wells

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[24] Petitioner's challenge to the award of prejudgment interest rests on the same " 'considerations of fairness' " that it urges in mitigation of the award generally. Pet. 40-41 (quoting *Board of County Commissioners* v. *United States,* 308 U.S. 343, 352 (1939)). The argument was properly rejected by both courts below. Pet. App. 71a-76a, 258a-259a. Similarly, petitioner's suggestion that consumers were not injured by its overcharges (Pet. 39) ignores the fact that, "because of the nature of the Entitlements Program, and the price control regulations, the effect of [petitioner's] wrong had been spread throughout the distribution chain, to the ultimate consumers." Pet. App. 78a; see pages 28-29, *infra.*

> where production was to go up or down, where to inject gas, and how much. . . . Most important, [petitioner] decided how the unit would account for upper and lower tier oil, first in 1974, before the field was legally unitized . . . later after Ruling 1975-15 was issued, . . . and finally when it switched to a unit BPCL under Section 212.75 in September 1976."

Thus, "[t]he undisputed evidence * * * supports the conclusion that [petitioner] is responsible for all of the overcharges." *Ibid.*[25]

TECA correctly concluded that operator liability is in accordance with the scheme established by Congress and is necessary to avoid a multiplicity of actions across the country against the almost 2500 owners of interests in Hawkins Field, which would " 'plunge the agency into an "administrative quagmire" * * * [and] effectively block enforcement of oil price controls at Hawkins Field.' " Pet. App. 57a (citations omitted). This conclusion by TECA, the court most familiar with the regulatory program at issue in this case, see *Tully* v. *Mobil Oil Corp.*, 455 U.S. at

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[25] Petitioner's argument (Pet. 39) that it cannot be held liable for overcharges attributable to Texaco's production from Hawkins Field was correctly rejected by TECA because the "uncontested facts established that [petitioner] did 'cause' th[ose] overcharges" as well as all of the others at the Hawkins Field Unit. Pet. App. 62a. Petitioner also renews in this Court (Pet. 23-24 n.22) a contention that TECA correctly ruled had not been properly preserved for appellate review (Pet. App. 66a-67a) concerning whether a small amount of the judgment had inadvertently been based on production from outside Hawkins Field. This claim apparently relates to production by a few owners whose tracts were in fact within the unit but who had not signed the unit agreement, production that in our view is properly encompassed within the judgment. In reviewing the record, we have not ascertained that any sales from tracts not within the Hawkins Field Unit were included in the judgment. In any event, petitioner's argument would have been more appropriately addressed to the lower courts through a motion to alter or amend the judgement had petitioner not already waived it.

248, is consistent with decisions of other courts of appeals in analogous contexts and warrants no further review. See *SEC* v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1308 (2d Cir.), cert. denied, 404 U.S. 1005 (1971); *Tenneco Oil Co.* v. *FPC*, 442 F.2d 489 (5th Cir. 1971).

5. Finally, the petitioners in Nos. 85-430, 85-432, 85-440, and 85-444[26] argue that the district court abused its discretion in ordering that restitution of Exxon's overcharges be made through the several States rather than allowing consumers and direct and indirect purchasers of crude oil to attempt to prove that they suffered actual and quantifiable losses as a result of Exxon's violations. These petitioners intervened only very late in the day in the district court and offered little support there for the contentions that they now press.[27] Although for the most part they do not now detail the basis on which they are entitled to the overcharges, the remedy petitioners—which include refiners, distributors, and ultimate consumers of crude oil—offered in the court of appeals competing and

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[26] We refer to these parties as the "remedy petitioners."

[27] After the district court had taken the full case under advisement following completion of briefing and oral argument, two groups moved to intervene with respect to the remedy for Exxon's overcharges. One was a group of crude oil refiners that conceded that the remedy issue was a purely legal question capable of resolution by summary judgment on the existing record. See R. 38337. The other was a group of independent gasoline retailers that did not offer any evidence or request a hearing. See R. 38986. After entry of judgment, various other groups sought to intervene. The district court granted each application to intervene for purposes of appeal. Pet. App. 82a n.45, 130a-134a. Given the content and timing of the remedy petitioners' motions in the district court, the full consideration of their arguments by the court of appeals, and the legal nature of the question of the district court's authority to adopt the restitutionary remedy that it ordered, there is no doubt that the remedy petitioners were afforded ample opportunity to be heard. Indeed, many of their arguments should properly be considered waived in view of the proceedings in the district court.

mutually contradictory theories for why each of them has the most compelling claim to the award.

a. The district court's order represents an unexceptional exercise of its broad equitable discretion to make restitution in a workable manner consistent with the goals of the statutory and regulatory scheme. TECA affirmed on the basis of its understanding of the operation of a complex set of regulations, no longer in effect, that governed pricing decisions in the petroleum industry. The court of appeals simply upheld one possible remedy as having appropriately been adopted in this case, without mandating the same approach in future cases. Moreover, the remedy adopted by the district court has no application outside the narrow confines of the now-defunct price control program because of the special nature of the government's cause of action and the unusual operation of the regulations at issue. See, *e.g.*, *In re DOE Stripper Well Exemption Litigation,* 578 F. Supp. 586, 592-593 (D. Kan. 1983) (noting differences between public price control and private antitrust actions). Finally, DOE recently has developed a restitutionary policy and proposed legislation that would apply to overcharges recovered in other oil price control cases. See 85-444 Pet. App. B1-B10, B14, B19-B22. In view of the factbound nature of the decision below, the procedural circumstances in which it was made, and its lack of continuing importance, further review by this Court is not warranted.

b. In any event, the remedy fashioned by the district court is well within the broad scope of its remedial power " 'to do equity and to mould [its] decree to the necessities of the particular case.' " *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946), quoting *Hecht Co.* v. *Bowles,* 321 U.S. 321, 329 (1944). Under the "Entitlements Program" then in effect, refiners with proportionally greater access to lower-priced old oil were required to make cash payments to refiners with relatively less access to such oil. In this way, the regulations "spread the benefits of access

to old price-controlled oil and the burden of dependence on uncontrolled oil among all sectors of the petroleum industry, all regions of the country, and among all consumers of petroleum products." *Cities Service Co.* v. *FEA*, 529 F.2d 1016, 1021 (Temp. Emer. Ct. App. 1975), cert. denied, 426 U.S. 947 (1976); see Pet. App. 87a-88a. 247a-248a. Other regulations permitted refiners to pass through increased costs to their customers. Pet. App. 87a-89a, 249a. "As a result of the pervasive system of price controls which then existed, therefore, Exxon's overcharges * * * were borne by ultimate consumers of petroleum products throughout the entire country." *Id.* at 249a (footnote omitted).[28]

It is little wonder then that both courts below found that "[t]he broad scattering of the ill effects of Exxon's wrongdoing renders impossible the tracing of the overcharges to their ultimate victims and the calculation of the precise damages suffered by each." Pet. App. 250a.[29] As the court of appeals concluded, "any attempt to trace increased costs attributable to the [Hawkins Field] overcharges

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[28] Certain of the remedy petitioners argue (*e.g.*, 85-430 Pet. 23) that this conclusion is questionable in light of the decontrol of prices of certain petroleum products before 1981. The absence of a specific regulation permitting refiners to pass through increased costs for those products, however, does not mean that the additional costs were not in fact passed through, nor does it simplify the ultimate task of identifying the actual victims of Exxon's overcharges and the extent of their injury. See generally *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 493 (1968) (noting difficulty of determining actual effect of price change "in the real economic world rather than an economist's hypothetical model").

[29] Indeed, it was admitted by many of the parties below that any attempt to trace the overcharges would be impossible. See Memorandum in Support of Conditional Motion of Indicated Refiners to Intervene 5, R. 38973 ("it is impossible to trace the impact of the overcharges directly to any subsequent purchasers"); Memorandum of National Freight et al. in Support of Motion to Intervene 2, R. 38547 ("it is administratively impracticable to attempt to entertain specific claims based on specific overcharges to identified customers"); Gladieux Br.

would require a full scale audit of the entire petroleum industry, and * * * any effort to do so would be futile." *Id.* at 88a. There is no basis for this Court to set aside this concurrent conclusion of both TECA and the district court.[30]

Nor is there any basis on which to disagree with TECA's

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9 ("[n]o such findings could possibly be made without an extremely time-consuming factual inquiry, one which is almost certainly beyond the capacity of any Court or administrative agency"); Marathon Br. 17 ("proving passthrough of overcharges would depend entirely on uncertain economic assumptions and impossibly complex measurements").

[30] The remedy petitioners rely on a report issued by DOE's Office of Hearings and Appeals (OHA) in another case (85-432 Pet. App. A321-A385) to argue (*e.g.*, 85-432 Pet. 13-14) that econometric modeling techniques are available that could identify within a broad range the percentages of overcharges that were absorbed by refiners. As OHA itself made clear, however (*e.g.*, 85-432 Pet. App. A343), and as DOE has reaffirmed, these figures "say [] nothing about the amount of the overcharges any particular refiner may have absorbed. * * * [S]ome refiners necessarily will have absorbed amounts less than the average while others obviously absorbed more." 85-444 Pet. App. B3 (DOE Statement of Restitutionary Policy). Thus, "any matching between the amount a particular refiner receive[d] and the amount of harm [that it] suffered * * * [would be] purely coincidental." *Id.* at B4. Moreover, "refunds based upon the econometric method developed by OHA would entail considerable administrative costs and very long delays before distribution. It could require further hearings or an individual claims procedure where innumerable direct purchasers could be given an opportunity to substantiate their individual claims. * * * The appropriateness of the burden, cost and delay of these further proceedings is problematic in view of the small percentage of the overcharges that would actually be distributed under such a method." *Id.* at B5-B6. Finally, even OHA's modeling estimates entailed "great inexactitude." *Id.* at B4; see 85-432 Pet. App. A383 (concluding that refiners as a class may have absorbed as little as 2.7% or as much as 8.1% of the overcharges). Certainly no court should be *required* to undertake the expense and delay of a claims procedure based on econometric models so inherently imprecise.

In a supplemental brief in support of their petition in No. 85-430, Marathon Petroleum Co., et al. (Marathon) attack OHA's actual report, primarily on the basis of correspondence from a Member of

conclusion that the remedy adopted by the district court is "equitable and fair, and a reasonable method of compensating the consuming public for the [Hawkins Field] overcharges." Pet. App. 91a. The district court modeled its remedy on the one adopted by Congress in the Warner Amendment, Pub. L. No. 97-377, § 155, 96 Stat. 1919-1920 (85-432 Pet. App. A316-A319), with respect to restitution of other petroleum overcharges. Pet. App. 254a-256a.[31] By earmarking funds for specific energy conservation programs, the Warner Amendment was designed "to benefit the class of persons injured by [oil price control] violations." 85-432 Pet. App. A316. Congress recognized that these conservation programs benefit the public at large by reducing our dependence on foreign oil. See S. Rep. 94-1119, 94th Cong., 2d Sess. 52 (1976); see also Pet. App. 256a. The remedy in this case thus "accomplishes the intent of Congress" (Pet. App. 91a) by

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Congress concerning an earlier draft of the report that was not adopted. TECA correctly rejected Marathon's eleventh-hour attempt to interject this incompetent and irrelevant evidence into the record (85-430 Supp. Br. App. 1a), and there is no reason for this Court to do otherwise. The OHA report recently was issued in a completely separate case and was not cited by either court in this action. See Pet. App. 80a n.43. The unsubstantiated allegations on which Marathon relies therefore could not possibly affect the outcome of the instant case.

[31] Contrary to the remedy petitioners' argument (*e.g.*, No. 85-430 Pet. 19), Congress did not intend through the Warner Amendment to prohibit courts from adopting similar restitutionary remedies in other cases. See 128 Cong. Rec. S15701 (daily ed. Dec. 20, 1982) (remarks of Sen. Kennedy). There is neither an express nor an implied indication in the Warner Amendment that Congress intended to limit the broad remedial authority inherently possessed by the courts in cases of this kind, see *Porter* v. *Warner Holding Co.*, 328 U.S. at 398, a limit that would have been a simple matter to articulate had Congress desired to do so. Finally, the district court made it clear that it was not relying on any implication of authority in the Warner Amendment itself but only on its "broad equitable powers to order restitution." Pet. App. 256a (footnote omitted).

helping "to relieve consumers of some of the burden of towering oil costs" (*id.* at 256a), a burden that was increased by "[t]he colossal scale of Exxon's wrongdoing" (*ibid.*). As TECA concluded (*id.* at 92a (footnote omitted)):

> While other remedies might have been adopted by the trial court, the remedy chosen avoids further administrative delay and confusion, with additional costs, it prevents the frustration of congressional objectives in securing prompt enforcement of what has been denominated as "emergency" price regulations, and it is a reasonable means to protect the public interest.

There is simply no warrant for upsetting the reasoned exercise of discretion affirmed below.

c. The remedy petitioners contend, however, that the failure of the courts below to permit them to present evidence of the fact and amount of their actual injuries was inconsistent with due process and restitutionary principles. This argument is completely without merit. This case is a government enforcement action pursuant to Section 209 of the Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed.) 1904 note. As TECA repeatedly has emphasized, "[a]ctions by the United States under ESA Section 209 are taken to enforce public, not private rights." Pet. App. 82a-83a (quotation marks and citations omitted). Section 209 does not create a cause of action on behalf of private persons who were injured by violations of the petroleum price regulations—that was provided by Congress in Section 210 of the Act, which is not at issue here. Because the remedy petitioners were not entitled to recover damages by way of restitution in this action, due process did not require that they be permitted to present evidence in support of their claims. Indeed, as the court of appeals noted, they were not even proper intervenors as of right. Pet. App. 83a (quoting *Cities Service Co.* v. *DOE*, 715 F.2d 572, 573-574 (Temp. Emer. Ct. App. 1983)). Cf. *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689

(1961); see also, *e.g.*, *United States* v. *Automobile Manufacturers Ass'n*, 307 F. Supp. 617 (C.D. Cal. 1969), aff'd *sub nom. City of New York* v. *United States*, 397 U.S. 248 (1969). The remedy petitioners thus were afforded ample, or more than ample, process by being permitted to raise their arguments below; nothing in the Due Process Clause requires that those arguments be accepted.

The cases on which the remedy petitioners rely (*e.g.*, 85-430 Pet. 12, 16) are unavailing. None of these cases establishes a protected property interest in a restitutionary fund that results from a government enforcement proceeding or otherwise requires that such a fund be distributed, whatever the administrative costs, on an individual basis to persons claiming to be the ultimate victims of illegal private activity. In *FPC* v. *Interstate Natural Gas Co.*, 336 U.S. 577 (1949), for example, funds had been paid into the court of appeals pursuant to that court's stay of an administrative order reducing natural gas rates. This Court held that, to the extent possible without "prolonged litigation," the court of appeals was required to "determine who suffered a loss as a result of the court's action in granting the stay." *Id.* at 584. Nothing in the Court's opinion purports to impose a duty on courts of equity to hold proceedings to attempt to identify the ultimate victims of an overcharge (especially one not resulting from an erroneous court order) where that has reasonably been determined to be impossible. Similarly, in *Porter* v. *Warner Holding Co., supra,* the Court held only that federal courts possess inherent equitable authority to order that a landlord's overcharges, which violated the Emergency Price Control Act of 1942, be restored to its tenants. The Court did not undertake to limit that equitable authority in the manner for which the remedy petitioners contend.

In sum, the restitutionary remedy under Section 209 is a government enforcement mechanism whose "central purpose * * * is to determine the amount by which the wrong-

doer has been unjustly enriched, and then to make him disgorge that amount." *Citronelle-Mobile Gathering, Inc.* v. *Edwards,* 669 F.2d 717, 722 (Temp. Emer. Ct. App.), cert. denied, 459 U.S. 877 (1982).[32] Section 209 "is not designed to provide redress for a victim who has suffered an injury because of a violation of a [price control] regulation." *Bulzan* v. *Atlantic Richfield Co.,* 620 F.2d 278, 282 (Temp. Emer. Ct. App. 1980). If compensation results, it is only as a "by-product of the agency's effort to reestablish compliance with its regulatory scheme." *Ibid.* Accordingly, Section 209, which evinces no intention "to limit the power of the courts or the agency * * * to a particularly strict interpretation of restitution," *Sauder* v. *DOE,* 648 F.2d at 1348, neither establishes in private persons an entitlement to disgorged funds nor requires a wasteful and ultimately futile attempt to determine the extent to which various persons or groups of persons were injured. While the district court was not compelled to shape the remedy precisely as it did, it acted well within its discretion by patterning the remedy after one established by Congress and directing that the funds be used in a manner that will help to undo the damage caused by the regulatory violations in this case.

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[32] TECA carefully distinguished the factual circumstances presented here from those in *Citronelle-Mobile,* which, it observed, involved only a single refiner, a single product, and identifiable customers. See Pet. App. 85a-87a. Even if the remedy petitioners were correct in contending (*e.g.*, 85-432 Pet. 24) that there is a conflict between that case and this one, the existence of such an intra-circuit conflict, which TECA is well able to resolve in the future, would be an argument against, not for, review here. *Wisniewski* v. *United States,* 353 U.S. 901, 902 (1957).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1985

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* The Solicitor General is disqualified in these cases.

U.S. GOVERNMENT PRINTING OFFICE: 1985—491-507/20108